CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 549

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ET AL., PETITIONERS,

vs.

BRASHEAR FREIGHT LINES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1940.

CERTIORARI GRANTED DECEMBER 16, 1940.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 549

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ET AL., PETITIONERS,

vs.

BRASHEAR FREIGHT LINES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	a	
Caption ..... (omitted in printing)	a	
Record from D. C. U. S., Western District of Missouri	1	1
Notice of appeal and notation of mailing of copy to counsel for appellees	1	1
Bill in equity	2	3
Rules, regulations and forms relating to operation of Motor Carriers, etc., on Highways in State of Missouri	7	7
Restraining order and order to appear for hearing	20	18
Bond on restraining order ..... (omitted in printing)	22	
Stipulation of parties (adopted by court as a modification of temporary restraining order)	23	20
Order modifying temporary restraining order	26	23
Petition of Plaza Express Company, Inc., et al., for leave to intervene	26	23
Order granting leave to Intervene to Plaza Express Company, Inc., et al.	29	25
Bond on intervention of Plaza Express Company, Inc., et al. ..... (omitted in printing)	30	
Joint answer of defendants	32	26
Counterclaim	44	38

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1941.

—1931

	Original	Print
Record from D. C. U. S., Western District of Missouri—Continued		
General denial of plaintiffs to counterclaim	46	40
Supplementary answer of defendants	47	40
Opinion of Court	49	43
Findings of fact and conclusions of law	56	48
Amended answer and counterclaim of defendants, Public Service Commission, et al	63	55
Suggestions in support of jurisdiction of amended counterclaim	65	57
Decree, August 4, 1938	69	61
Petition of defendants for rehearing and motion to modify decree	71	62
Suggestions in support	72	63
Order modifying decree and overruling petition for rehearing, September 16, 1938	76	67
Statement of evidence	77	67
Caption	77	67
Bill in equity	77	68
Stipulation of parties adopted by court as modification of temporary restraining order	77	68
Motion of Public Service Commission to cite plaintiffs for noncompliance with provisions of modified temporary restraining order	78	68
Counterclaim made a part of answer	78	68
General denial of plaintiffs to counterclaim	78	69
Colloquy	79	69
Amended answer and counterclaim	81	71
Decree	82	72
Petition for rehearing, etc.	82	72
Order modifying decree	83	73
Motion of defendants for costs	84	73
Statement supplementing statement of evidence	85	75
Mandate of Supreme Court of United States	87	76
Stipulation as to common carrier fees received by Roy B. Chipps, trustee, from certain plaintiffs, etc	88	77
Motion of defendants, Public Service Commission, et al., for damages	90	79
Order overruling motion for damages, July 5, 1939	94	83
Motion of defendants to set aside order overruling and to reconsider motions for damages	94	83
Suggestions in support of motion	96	85
Order overruling motion to set aside order overruling defendants' motion for damages, July 25, 1939	101	89
Rules of defendant, Public Service Commission	102	90
(a) Rule No. 7, application for temporary permits by interstate carriers	102	90
(b) Rule No. 8, fees for temporary permits of interstate carriers	102	90
(c) Rule No. 13, ports of entry	103	91
(d) Rule No. 14-B, Emergency vehicle	103	91
(e) Rule No. 15-B, issuance and use of travel orders	105	93

	Original	Print
Record from D. C. U. S., Western District of Missouri—Continued		
Stipulation as to contents of transcript	105	93
Points upon which appellants intend to rely	108	95
Clerk's certificate to transcript..(omitted in printing)..	109	
Appearances of counsel .....(omitted in printing)..	110	
Notice of filing of motion of appellees to dismiss appeal	112	97
Motion of appellees to dismiss appeal	113	97
Order of submission	115	98
Opinion, Woodrough, J.	116	99
Dissenting opinion, Bell, J.	122	104
Decree	124	105
Petition of appellants for rehearing..(omitted in printing)..	125	
Order denying petition of appellants for rehearing	138	106
Motion of appellants for stay of mandate	139	106
Order staying mandate	139	106
Clerk's certificate .....(omitted in printing)..	140	
Order allowing certiorari	141	107

BLANK PAGE

[fol. a] [Caption omitted.]

[fol. 1]

IN DISTRICT COURT OF THE UNITED STATES FOR THE CENTRAL DIVISION OF THE WESTERN DISTRICT OF MISSOURI

No. 665. In Equity

BRASHEAR FREIGHT LINES, INC., et al., Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION OF MISSOURI; STATE HIGHWAY COMMISSION OF MISSOURI; B. M. Casteel, Superintendent of the Missouri State Highway Patrol, and Hon. Roy McKittrick, Attorney-General of the State of Missouri, Defendants

NOTICE OF APPEAL—Filed October 3, 1939

Notice is hereby given that Public Service Commission of Missouri, State Highway Commission of Missouri, B. M. Casteel, Superintendent of the Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney-General of the State of Missouri, defendants above named, hereby appeal to the Circuit Court of Appeals for the Eighth Circuit from the Order Overruling Motion For Damages, which said Order appealed from reads as follows:

"It appearing to the Court that the subject matter and the relief prayed for in defendants' Motion For Damages, filed May 22, 1939, has heretofore been ruled and finally determined in this cause, the motion above referred to is hereby overruled."

The above Order, from which appeal is taken, was entered on July 5, 1939.

James H. Linton, General Counsel. Daniel C. Rogers, Assistant Counsel, Public Service Commission of Missouri, Jefferson City, Missouri, Attorneys for Appellants.

[fol. 2] MEMORANDUM OF MINUTE ENTRY OF OCTOBER 3, 1939, SHOWING MAILING OF NOTICE OF APPEAL

October 3, 1939—Notice of Appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the Order Overruling Motion for Damages, in the case of Brashear Freight Lines, Inc., et al., vs. Public Service Commission of Missouri, et al., No. 665, In Equity, mailed to Mr. Kenneth Teasdale, Attorney for Plaintiff, Boatmen's Bank Building, St. Louis, Missouri, in compliance with Section d of Rule 73 of the New Rules of Civil Procedure for the District Courts.

IN UNITED STATES DISTRICT COURT

BRASHEAR FREIGHT LINES, INC. (A Corporation), ST. LOUIS FORWARDING COMPANY (A Corporation), St. Louis Eastern Truck Lines, Inc. (A Corporation), Viking Freight Company (A Corporation), Be-Mac Transport Company, Inc. (A Corporation), Consolidated Forwarding Company, Inc. (A Corporation), Husmann & Roper Freight Lines, Inc. (A Corporation), Mound City Forwarding Company, Inc. (A Corporation), Powell Brothers Truck Lines, Inc. (A Corporation), Toedebusch Transfer, Inc. (A Corporation), Highway Merchandise Carriers, Inc. (A Corporation), Campbell 66 Express, Inc. (A Corporation), Midland Truck Line, Inc. (A Corporation), Lawrence A. Elliott Truck Service, Inc. (A Corporation), Gordon's Transports, Inc. (A Corporation), George Kimbel Truck Lines, Inc. (A Corporation), Missouri, Kansas & Colorado, Inc. (A Corporation), L. A. Tucker Truck Line, Inc. (A Corporation), Schwartz Truck Terminal (A Corporation), Superior Forwarding Company, Inc. (A Corporation), Cole Motor Service, Inc. (A Corporation), Commerce Cartage Company (A Corporation), Spector Motor Service, Inc. (A Corporation), Potashnick [fol. 3] Truck Service, Inc. (A Corporation), Bryant Truck Lines, Inc. (A Corporation), F. & F. Transportation Company, Inc. (A Corporation), Dexter Daily Truck Service, Inc. (A Corporation), Night Hawk, Inc. (A Corporation), Western Trucking Company, Inc. (A Corporation), Decatur Cartage Company (A Corporation), F.

F. Frey Company (A Corporation), Dohrn Transfer Company (A Corporation), Lucido Bros. Grocery Company, Inc. (A Corporation), Interstate Dispatch, Inc. (A Corporation), Hayes Freight Lines, Inc. (A Corporation), Egyptian Express (A Corporation), Roadway Express, Inc. (A Corporation), Service Lines, Inc. (A Corporation), Wilson Truck Company (A Corporation), Highway Express, Inc. (A Corporation), Robinson Motor Lines (A Corporation), Voss Truck Lines, Inc. (A Corporation), Southport Truck Lines (A Corporation), Kern, Inc. (A Corporation), Transamerican Freight Lines, Inc. (A Corporation), C. F. Reddish, Doing Business as Reddish Truck Service, R. A. Sand, Doing Business as Sand Motor Express Company, William Shadalov, Doing Business as Overnight Freight Service, Clarence M. Robertson, Doing Business as Robertson Truck Lines, Plaintiffs,

vs.

Public Service Commission of the State of Missouri, Highway Commission of the State of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol and Honorable Roy McKittrick, Attorney General of the State of Missouri, Defendants

Bill in Equity—Filed May 15, 1937

The Plaintiffs above named file this, their Bill in Equity, and, for their cause of action, respectfully state:

That plaintiffs Brashear Freight Lines, St. Louis Forwarding Company, St. Louis Eastern Truck Lines, Inc., Viking Freight Company, Be-Mac Transport Company, Inc., Consolidated Forwarding Company, Inc., Husmann & Roper Freight Lines, Inc., Mound City Forwarding Company, Inc., Powell Brothers Truck Lines, Inc., Toedebusch Transfer, Inc., Highway Merchandise Carriers, Inc., Campbell 66 Express, Inc., Midland Truck Line, Inc., Lawrence A. Elliott [fol. 4] Truck Service, Inc., Gordon's Transports, Inc., George Kimbel Truck Lines, Inc., Missouri, Kansas & Colorado, Inc., L. A. Tucker Truck Line, Inc., Schwartz Truck Terminal, Superior Forwarding Company, Inc., Cole Motor Service, Inc., Commerce Cartage Company, Spector Motor Service, Inc., Potashnick Truck Service, Inc., Bryant Truck Lines, Inc., F. & F. Transportation Company, Inc., and Dex-

ter Daily Truck Service, Inc., are corporations organized and existing under and by virtue of the laws of the State of Missouri; that defendants Night Hawk, Inc., Western Trucking Company, Inc., Decatur Cartage Company, F. F. Frey Company, Dohrn Transfer Company, Lucido Bros. Grocery Company, Inc., Interstate Dispatch, Inc., Hayes Freight Lines, Inc., and Egyptian Express, are corporations organized and existing under and by virtue of the laws of the State of Illinois; that Roadway Express, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Ohio; that Service Lines, Inc., Wilson Truck Company, and Highway Express, Inc., are corporations organized and existing under and by virtue of the laws of the State of Tennessee; that Robinson Motor Lines is a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that Voxx Truck Lines, Inc., and Southport Truck Lines are corporations organized and existing under and by virtue of the laws of the State of Oklahoma; that Kern, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Indiana; and Transamerican Freight Lines, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Michigan; that plaintiff C. F. Reddish is engaged as a common carrier, doing business under the name and style of Reddish Truck Service; that plaintiff R. A. Sand is engaged as a common carrier, doing business under the name and style of Sand Motor Express Company; that plaintiff William Shandalov is engaged as a common carrier, doing business under the name and style of Overnight Freight Service; and that plaintiff Clarence M. Robertson is engaged as a common carrier, doing business under the name and style of Robertson Truck Lines. Plaintiffs state that they are all engaged as common carriers by motor vehicle in the carriage of property in interstate commerce to, from, and within the State of Missouri.

[fol. 5] That defendant Public Service Commission of Missouri is an entity created and established by the laws of the State of Missouri, and, as such, authorized by the laws of the State of Missouri, and, as such, authorized to sue and be sued in its official name, and having its principal office at the City of Jefferson City, the State capital of the State of Missouri; that said defendant, by the laws of the State

of Missouri, is, among other things, vested with jurisdiction and supervision with reference to all common carriers operating or doing business within said State, and with reference to persons, corporations, or partnerships engaged in the transportation of property or freight within said State.

That defendant State Highway Commission of Missouri is an entity created and established by virtue of the laws of the State of Missouri, and, as such, authorized to sue and be sued in its official name; that said defendant, by the laws of the State of Missouri, has supervision of highways and bridges which are constructed, improved and maintained in the State of Missouri.

Plaintiffs further state that said State Highway Commission has direction of, and supervision over, the Missouri State Highway Patrol, which is authorized by the laws of the State of Missouri to patrol the highways constructed and maintained by the State Highway Commission of Missouri to regulate the movements of traffic thereon and to enforce thereon the laws of the State of Missouri relating to the operation and use of vehicles on the highways thereof, and to enforce and prevent violation of all laws with reference to the use of said highways; that defendant B. M. Casteel is Superintendent of the State Highway Patrol, and, as such, has command of same and directs its activities.

That the Honorable Roy McKittrick is the duly elected, qualified, and acting Attorney General of the State of Missouri, and, as such, is charged with the duty of enforcing the laws thereof, and is a citizen and resident of the State of Missouri, and resident within the Central Division of the Western Judicial District of Missouri.

That each of the defendants was, at all times herein mentioned, and still is, a resident and citizen of the State of [fol. 6] Missouri, and of the Central Division of the Western Judicial District of Missouri.

That the grounds upon which the jurisdiction of this Court in this action depends are that the questions involved herein are questions arising under the Constitution and the laws of the United States, and arising by authority of the fact that certain laws and regulations promulgated pursuant thereto of the State of Missouri are in conflict with the Constitution and laws of the United States, and that the matter in controversy exceeds as to each plaintiff the

sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

Plaintiffs further state that at all times herein mentioned they were, and now are, motor carriers, being common carriers of property for hire, engaged in the business of carrying property, by means of motor vehicles, over the highways of the States of Missouri, Illinois, and of other States, and that they have invested in equipment and in goodwill and in an established clientele in said business the sum of several hundreds of thousands of dollars; that they severally own and operate fleets of motor trucks carrying property for hire in interstate commerce in the State of Missouri.

Plaintiffs further state that there was enacted by the General Assembly of the State of Missouri a certain act, approved on May 6, 1931, and entitled, "An Act To Repeal Article VIII of Chapter 33 of the Revised Statutes of Missouri, 1929," entitled "Transportation of Persons By Motor Vehicles," and to enact in lieu thereof a new article containing seventeen sections, numbers 5264 to 5280, both inclusive, and to be known as Article VIII of Chapter 33, providing for the supervision, regulation, and licensing of transportation of persons and property for hire over the public highways of the State of Missouri by motor vehicle, conferring jurisdiction upon the Public Service Commission to license, regulate, and supervise such transportation, providing for the enforcement of the provisions of this act, and for the punishment for violation thereof.

Plaintiff further states that, acting under said Act of the General Assembly of the State of Missouri, or purporting to act thereunder, defendant, the Public Service [fol. 7] Commission of the State of Missouri, at a session held at the office of the Public Service Commission in Jefferson City, in the State of Missouri, on September 14, 1931, all of said members being present, adopted General Order No. 27 of said Commission, canceling General Order No. 25, heretofore issued by said Commission, Said General Order No. 27 becoming effective on the 15th day of September, 1931, and establishing certain rules, regulations and forms, relating to the operation of motor carriers and contract haulers in the transportation of persons and property, for hire, by motor vehicle on the public highways in the State of Missouri, a duly authorized copy of said rules, regulations and forms being filed in the archives of said Public Service

Commission, and providing that such copy shall be deemed an original record; said rules, regulations, and forms being, in part as follows:

RULES, REGULATIONS AND FORMS

Rule No. 6. Application for Interstate Permit, Persons and/or Property.

Rule No. 7. Annual License Requirements.

Rule No. 12. Liability Insurance. Interstate Carrier of Persons or Property.

Rule No. 13. Liability Insurance. Indorsement. Interstate Carrier of Persons or Property.

Rule No. 20. Trailers to be Licensed.

Rule No. 27. Annual License Must Be Attached to Vehicles.

Rule No. 33. Motor Vehicles Must Carry P.S.C. No.

Rule No. 34. License Fee Based on Weight-Carrying Capacity.

Rule No. 35. Applicant Must Furnish Load Capacity Data.

Rule No. 36. Vehicle Must have Weight Capacity Mark On Side.

Rule No. 40. Accidents Must Be Reported.

Rule No. 44. Interstate Operators—Limitations of Service.

[fol. 8] Rule No. 47. Articles Prohibited, or Regulated, in Freight Service.

Rule No. 48. Braking Requirements.

Rule No. 49. Ventilators, Speedometers, Skid Chains, Extra Tire.

Rule 50. Motor Vehicles Must Be Amply Strong For Maximum Load; Other Requirements.

Rule No. 52. Motor Vehicle Lighting Requirements.

Rule No. 53. Receipts for Freight Required.

Rule No. 56. Red Torches or Flags for Stalled Vehicles.

Rule No. 57. Working Hours Requirements.

Rule No. 62. Drivers Shall Slow Down at Bridges, Curves, Etc.

Rule No. 63. Speed Requirements.

Rule No. 64. Tariff Provisions.

Rule No. 65. Tariffs Must Be On Standard Forms.

Rule No. 66. Copies of Tariffs Must Be Filled.

Rule No. 68. Special Tariff Rules Governing Transportation of Property.

Rule No. 69. Contract Haulers Must File Rates, Etc.
Rule No. 73. Daily Record of Vehicles Used.
Rule No. 74. Annual Reports Required.
Rule No. 76. Penalty for Violation. The violation of any of the foregoing rules shall be a cause for revocation of the certificates of convenience and necessity of permits issued by the Commision.

(The rules mentioned above were pleaded at length, but, by agreement, titles only are saved for the Transcript of Record.)

Plaintiffs further state that defendants are threatening to enforce the aforesaid act of the General Assembly of the State of Missouri as to them, and are threatening to enforce the provisions of said General Order No. 27, and have [fol. 9] advised plaintiffs of their intention so to do, and have advised plaintiffs that unless in all manner and respect they comply with the provisions of said act of the General Assembly, and of said General Order No. 27, that they will be barred from entering the State of Missouri, and from engaging in interstate commerce therein, and will be prevented from carrying property in interstate commerce to terminals in the City of St. Louis, and to other points in the State of Missouri in interstate commerce, and that defendants are threatening to bring against plaintiffs actions to forfeit and pay to the State of Missouri the license fees provided for in Section 5272 of the aforesaid act of the General Assembly of the State of Missouri, and actions to forfeit and pay to the State of Missouri the penalties provided by Section 5272 thereof for non-observance of its provisions; and plaintiffs state that as a direct result of said act, so threatened by defendants, they will be subjected to numerous suits for the purpose of collecting said forfeitures and penalties, and that plaintiffs, their agents and servants, will be subjected to numerous groundless, vexatious, and criminal prosecutions under the provisions of Section 5275 of the aforesaid act of the General Assembly of the State of Missouri, and that plaintiffs will be subjected to a multiplicity of suits, claims, and demands, civil and criminal.

Plaintiffs further state that the aforesaid act of the General Assembly of the State of Missouri, approved May 6, 1931, is unconstitutional, null, and void, and is in conflict with a certain act of the Congress of the United States, known as "Motor Carrier Act, 1935," February 4, 1887,

c 104 Part II pg. 201 as added August 9, 1935 c. 498 Pg. 1 49 Stat.), and is in conflict with various rules and regulations hereinafter referred to, promulgated by the Interstate Commerce Commission, pursuant to authority vested in it under and by virtue of said Motor Carrier Act, 1935, and violates the Constitution of the United States of America, as hereinafter set out, and that defendant is without warrant or authority in law to enforce the provisions of said act and of General Order No. 27 against plaintiffs, and that there is no warrant or authority in law and for said threatened criminal prosecution and said suit to recover forfeitures and penalties, and that without the interposition [fol. 10] of this Honorable Court, plaintiffs will be without relief and their business, property, and goodwill will be injured, impaired, and destroyed, and they will be subjected to harassment and to civil suits and criminal prosecutions to recover fees and penalties provided for in said act of the General Assembly of the State of Missouri and in said General Order No. 27, and that in the circumstances they have no adequate remedy at law.

Plaintiffs state that they operate and use their equipment, herein referred to, within the State of Missouri in interstate commerce, and that the enforcement of said act of the General Assembly of Missouri, and of the provisions of said General Order No. 27 as to them is, and would be, an interference with the rights of the Congress of the United States to regulate commerce among the several states, and constitutes an unreasonable burden upon interstate commerce, and that said act of the General Assembly of the State of Missouri, and said General Order No. 27 are in conflict with the aforesaid Motor Carrier Act, 1935, and with various rules and regulations promulgated by the Interstate Commerce Commission, pursuant thereto, and said enforcement is, and would be, in violation of Section 8, of Article I, of the Constitution of the United States of America.

Plaintiff further states that said Motor Carrier Act, 1935 vests in the Interstate Commerce Commission the regulation of the transportation of passengers or property by motor carriers engaged in interstate commerce and the procurement of and the provision of facilities thereof and imposes on the Interstate Commerce Commission the duty to regulate common carriers by motor vehicle in interstate commerce to the end that said Commission may establish

reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment; authorizes the Commission to establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment; and to administer, execute and en- [fol. 11] force all of the provisions of said Motor Carrier Act, 1935, and to make all necessary orders in connection therewith and to prescribe rules, regulations and procedure for such administration.

Plaintiffs state that at divers times, as hereinafter mentioned, the Interstate Commerce Commission, pursuant to the authority vested in it by said Motor Carrier Act, 1935, has promulgated rules and regulations with reference to the duty and obligation of common carriers in interstate commerce concerning the necessity of providing liability insurance, providing for rules and regulations covering qualifications of employees and safety of operation and equipment of common carriers by motor vehicles, and with reference to various other matters and things relating to the operation of common carriers by motor vehicles in interstate commerce.

Plaintiffs further state that said Motor Carrier Act, 1935, provides that no common carrier by motor vehicle shall engage in any interstate commerce on any public highway without securing a certificate of public convenience and necessity from the Interstate Commerce Commission and that no person shall engage in the business of a contract carrier by motor vehicle in interstate commerce on any public highway without securing a permit issued by the Interstate Commerce Commission authorizing such person to engage in such business and provides rules and regulations for the issuance of such certificates of public convenience and necessity and such permits by the Interstate Commerce Commission and provides that no such certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as to a self-insurer or other securities or agree-

ments, in such reasonable amount as the Commission may require, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles under such certificate or permit, or for loss or damage to property of others; and further authorizes the Commission in its dis-
[fol. 12] cretion and under such rules and regulations as it shall prescribe, to require any such common carrier to file a surety bond, policies of insurance, qualifications and a self-insurer, or other securities or agreements, in a sum to be determined by the Commission, to be conditioned upon such carrier making compensation to shippers and/or consignees for all property belonging to shippers and/or consignees and coming into the possession of such carrier in connection with its transportation service.

Plaintiff further states that said Motor Carrier Act, 1935 required every common carrier of property by motor vehicle to provide safe and adequate service, equipment and facilities for the transportation of property in interstate commerce and to establish, observe, and enforce just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation and all matters relating to or connected with the transportation of property in interstate commerce and authorizes the Interstate Commerce Commission to make regulations in connection therewith; and provides for the filing of tariffs, schedules and contracts with the Interstate Commerce Commission and authorizes the Interstate Commerce Commission to require annual, periodical or special reports from all motor carriers and to prescribe the manner and form thereof and provides for the method of service of process upon motor carriers coming within the provision of the Motor Carrier Act, 1935.

Plaintiffs further state that pursuant to the provisions of Section 206 of the said Motor Carrier Act, 1935, providing in the case of carriers in bona fide operation as common carriers by motor vehicle on June 1, 1935, in certain instances, that the Commission should issue such certificates without requiring certain further proof they have applied for and are qualified to receive such certificates of public convenience and necessity to operate as common carriers

in interstate commerce into, from and in the State of Missouri; and plaintiffs state that said Interstate Commerce Commission has the sole and exclusive power to issue certificates of convenience and necessity and to regulate the trans- [fol. 13] portation of property in interstate commerce by motor carrier, and that said act of the General Assembly of the State of Missouri is in conflict with said Motor Carrier Act, 1935, and is unconstitutional and null and void and denies, and to the extent it is enforced by defendants, as now imminently threatened, would deny to the Congress of the United States the right to regulate commerce among the several states, all in violation of Section 8 of Article I of the Constitution of the United States.

That Section 5266 of the said Act of the General Assembly of the State of Missouri, in attempting to regulate charges of motor carriers transporting property in interstate commerce, is in conflict with the various provisions of said Motor Carrier Act, 1935, to-wit, Sections 216, 217, and 218 thereof; that Section 5267 of the Act of the General Assembly of the State of Missouri, and the provisions thereof, attempting to confer on defendant Public Service Commission the power and authority to license, supervise, and regulate motor carriers and to approve rates, charges, classifications, and to promulgate rules and regulations governing such carriers, and prescribing systems of accounting, and providing for filing various reports, are in conflict with said Motor Carrier Act, 1935, and more particularly with Sections 204, 206, 207, 216, 217, and 200 thereof; that Section 5268, and the provisions thereof requiring motor carriers using public highways in the State of Missouri, for the transportation of property in interstate commerce, to secure an interstate permit by applying to defendant Public Service Commission, and authorizing said Commission to regulate the issuance of said permits, is in conflict with Sections 206 and 207 of the Motor Carrier Act, 1935; that Section 5273, requiring motor carriers to file liability insurance policies with defendant Public Service Commission, is in conflict with Section 215 of said Motor Carrier Act, 1935; that Section 5274 of the Act of the General Assembly of the State of Missouri, authorizing defendant Public Service Commission to make such safety rules and regulations for the operation of motor vehicles, as are therein provided for, is in conflict with Section 204 of said Motor Carrier Act, 1935.

[fol. 14] Plaintiffs further state that pursuant to authority

vested in it by the Motor Carrier Act, 1935, the Interstate Commerce Commission has, from time to time, issued and promulgated various rules and regulations governing the operations of motor carriers, and that the rules, regulations, and orders, and the parts of said General Order No. 27 promulgated by the defendant Public Service Commission, are in conflict with said rules and regulations promulgated by the Interstate Commerce Commission in the following particulars, to-wit:

That on or about the 3rd day of August, 1936, the Interstate Commerce Commission promulgated rules with reference to the filing and approval of surety bonds and policies of insurance by motor carriers engaged in interstate commerce; that the provisions of Rule 13 of General Order No. 27, above set out, are in conflict with said rules and regulations of the Interstate Commerce Commission and require other, different, and additional insurance, and make increased demands, placing unreasonable burdens upon plaintiffs and upon their operations in interstate commerce, all in conflict with said rules of the Interstate Commerce Commission and with said Motor Carrier Act, 1935.

That on the 23rd day of December, 1936, the Interstate Commerce Commission promulgated rules and regulations with reference to lighting requirements, qualifications of employees, and safety of operation and equipment of common carriers engaged in interstate commerce, which rules set forth certain requirements with reference to lights and lighting equipment and devices required for common carriers by motor truck, engaged in interstate commerce; that defendant Public Service Commission, by Rule 52 of said General Order No. 27, provides for other, different, and additional lights, lighting equipment and devices upon motor vehicles engaged as common carriers in interstate commerce in the State of Missouri, thereby making increased demands and placing unreasonable burdens upon plaintiffs and upon their operations in interstate commerce, all in conflict with said rules and regulations of the Interstate Commerce Commission, as aforesaid, and with the Motor Carrier Act, 1935.

[fol. 15] Plaintiff states that the Interstate Commerce Commission, on or about December 23, 1936, promulgated rules and regulations concerning the brakes and braking equipment required of a common carrier by motor vehicle,

engaged in interstate commerce; that defendant Public Service Commission, by Rule 48 of General Order 27, as aforesaid, provides for other, different, and additional brakes, braking equipment, and braking requirements on motor vehicles, so engaged in interstate commerce in the State of Missouri, thereby making increased demands and placing unreasonable burdens upon plaintiffs and upon their operations in interstate commerce, all in conflict with said rules and regulations of the Interstate Commerce Commission, and with the Motor Carrier Act, 1935.

Plaintiffs further state that from time to time the Interstate Commerce Commission has promulgated various regulations to govern the construction and filing of common carrier freight rate and classification publications and supplements thereto, and said Interstate Commerce Commission more particularly did, under date of January 6, 1936, effective January 8, 1936, promulgate such rules and regulations; and, on November 7, 1936, effective January 1, 1937, said Interstate Commerce Commission did issue Supplement No. 1 to the aforesaid regulations.

Plaintiffs further state that defendant Public Service Commission, by Rules 64, 65 and 66 of said General Order 27, provides for other, different, and additional rules and regulations with reference to the construction and filing of common carrier freight rate and classification publications as to motor vehicles, engaged as common carriers in interstate commerce in the State of Missouri, thereby making increased demands and placing unreasonable burdens upon plaintiffs and upon their operations in interstate commerce, all in conflict with the rules and regulations aforesaid of the Interstate Commerce Commission and with the provisions of said Motor Carrier Act, 1935.

That Section 5272 of said act, providing that every motor carrier shall, at the time of the issuance of a certificate of convenience and necessity or an interstate permit, and annually thereafter, pay an annual license fee ranging from [fol. 16] Twenty-five Dollars ($25.00) to Five Hundred Dollars ($500.00), and providing a penalty and forfeiture of Five Hundred Dollars ($500.00) to the State of Missouri, to be collected from any motor carrier using the highways of the State of Missouri in interstate transportation of persons or property, or both, without securing an interstate permit and without paying said license fee and filing a bond

or insurance policy, is unconstitutional and null and void; and that the provisions of said Section 5272, providing that where a motor carrier is operating within this and an adjoining state, and the total mileage of said route in Missouri is ten miles or less, the license fee shall be one-third of the license fee otherwise provided for, and providing further that where a motor carrier is operating a route in this state the total mileage of which is not greater than twenty miles, the license fee shall be one-half of the license fee otherwise provided for, is unconstitutional and null and void; that under said Motor Carrier Act, 1935, the Interstate Commerce Commission has the sole and exclusive power to issue permits to motor carriers using the highways of the State of Missouri in the interstate transportation of persons or property or both and of fixing the fees therefor and of providing for the furnishing of bonds and insurance policies by motor carriers in interstate commerce; that said license fees provided for in said Section 5272 are so connected with the issuance of certificates of convenience and necessity and/or interstate permits that the provisions are not separable and that said entire Section 5272 is in conflict with said "Motor Carrier Act, 1935" and is unconstitutional and null and void and denies to the Congress of the United States the right to regulate commerce among the several states in violation of Section 8 of Article I of the Constitution of the United States of America.

That said license fees provided for carriers engaged in interstate commerce, and license fees provided in cases wherein a motor carrier is operating within Missouri and an adjoining state with a total mileage in Missouri of ten miles or less, and providing a license fee where a motor carrier is operating a route in the State of Missouri the total mileage of which is not greater than twenty miles, are unconstitutional, null and void, in that said fees bear no reasonable relation to the use and the extent of the use [fol. 17] of the highways in the State of Missouri by such motor vehicles, and that the fees therein provided for are excessive and grossly excessive and constitute an unreasonable burden on interstate commerce and upon the operations of plaintiffs engaged therein, and that the amount of the fees so provided for is not based upon the amount or the extent of the use of the highways in the State of Missouri, and constitute mere arbitrary charges and burdens upon in-

terstate commerce and against the operations of plaintiffs herein in interstate commerce, all in violation of Section 8 of Article I of the Constitution of the United States.

Plaintiff further states that the provisions of said General Order No. 27 are in conflict with said Motor Carrier Act, 1935 insofar as they relate to the transportation of property in interstate commerce and that by said rules defendant is attempting to regulate the licensing, operation and equipment of motor carriers engaged in interstate commerce in violation of the provisions of said Motor Carrier Act, 1935 and that said regulations are in violation of Section 8 of Article I of the Constitution of the United States and are unconstitutional and void.

Plaintiffs further state that the defendants, unless restrained and enjoined by this Honorable Court, intend to enforce said void and unconstitutional act of the General Assembly of the State of Missouri, and said void and unconstitutional Order No. 27 promulgated pursuant thereto against these plaintiffs, and are threatening to do so forthwith; and that these plaintiffs, their agents, servants, and employees, will be subjected to a multiplicity of groundless civil suits and suits to collect penalties and forfeitures, and that plaintiffs, their agents, servants and employees, will be subjected to numerous and groundless criminal prosecution, and plaintiffs will be harassed in their business and property, and their business, property rights, and goodwill will be impaired, injured, and destroyed, and plaintiffs will suffer immediate and irreparable injury, loss and damage thereto.

Plaintiffs state that they regularly have been, and now are, daily and hourly receiving shipments of property to [fol. 18] be transported into, from and within the State of Missouri in interstate commerce, and that if this Honorable Court does not restrain the action of defendants, as aforesaid, now imminently threatened, plaintiffs will be unable to accept, transport, and deliver such shipments, in accordance with contracts they have entered into and are daily and hourly entering into with respect to said shipments, and will be unable to fulfil the duties and obligations imposed upon them by law as common carriers in interstate commerce with respect thereto, so that they will become liable to numerous losses and suits, claims, and demands by various shippers and consignees in amounts far in excess

as to each plaintiff of the sum of Three Thousand Dollars ($3,000.00), and so that their status as common carriers under the Motor Carrier Act, 1935 will be destroyed by reason of their inability to fulfil said duties as common carriers, as required by said Act, all as a result of the threats and threatened action, as aforesaid, of defendants.

Plaintiffs further state that irreparable loss and damage will result to them unless a temporary restraining order is granted herein before hearing and determination of the application for an interlocutory injunction, hereinafter prayed for, to remain in force and effect until the hearing and determination thereof.

Plaintiffs allege that in view of the foregoing, immediate and irreparable injury, loss, and damage will result to plaintiffs before notice can be served on the defendants herein, and a hearing had thereon, in accordance with the provisions of Section 266 of the Judicial Code of the United States as amended by Act of Congress.

Plaintiffs further respectfully show to the Court that all of said circumstances above enumerated deprive plaintiffs of their property without due process of law, take their property without compensation, and deny to them equal protection of the law, all in violation of their rights under the Constitution of the United States and under Amendments V and XIV thereto, and in violation of their rights under the Constitution of the State of Missouri and of Article II, Sections 4, 21, and 30 thereof.

[fol. 19] Wherefore, the premises considered, Plaintiffs pray this Honorable Court for its order enjoining and restraining defendants from interfering with, stopping, or attempting to interfere with or stop plaintiffs, their agents, servants, and employees, from using the streets and highways of the City of St. Louis and of the State of Missouri in Interstate Commerce, and from interfering with, or attempting to interfere with, plaintiffs in conducting their business of carriage of freight by motor vehicle in interstate commerce into, from, and within the State of Missouri, and from instituting, or causing to be instituted, against plaintiffs any civil action or actions to collect penalties provided for in said Act of the General Assembly of the State of Missouri, and from instituting and prosecuting, or causing to be instituted and prosecuted, any criminal action or actions under said Act; and that defendants be ordered to

show cause why an interlocutory injunction pending the final hearing and determination of this cause should not be issued, and that a temporary restraining order forthwith issue, restraining defendants, as aforesaid, pending hearing and determination of the application for an interlocutory injunction, to remain in force until such hearing and determination; and for such other and further relief as to the Court shall seem meet and proper.

B. W. LaTourette, Kenneth Teasdale, Attorneys for Plaintiffs, 314 No. Broadway, St. Louis.

Duly sworn to by Roy B. Chipps, jurat omitted in printing.

[fol. 20] IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER AND ORDER TO APPEAR FOR HEARING—Filed May 15, 1937

Whereas, in the above-named cause, it has been made to appear, upon the Bill of Complaint, filed herein that a Writ of Injunction preliminary to the final hearing is proper, and that *prima facie* complainants are entitled thereto, enjoining the defendants from the acts complained of, threatened, and about to be committed;

Now, on application of said complainants, it is Ordered that the defendants appear before the Judge of this District Court of the United States for the Central Division of the Western District of Missouri and a Judge of the Circuit Court of the United States, and another District Judge of the United States Court, sitting to hear this matter, at the Court Room of the United States Court at Kansas City, Missouri, and then and there show cause, if any they have, why the interlocutory injunction therein prayed for should not issue, and it appearing to the undersigned District Judge that there is danger of irreparable injury and damage to complainants before the hearing of said application for this interlocutory writ of injunction, unless defendants are, pending such hearing, restrained, as hereinafter set forth;

Therefore, Complainants' application for such restraining order is granted upon its giving bond with good and sufficient surety to be approved by the Clerk of this Court, in the penal sum of Ten Thousand Dollars ($10,000.00), securing the said defendants against all loss or damage

which may result from the issuance of said order, if it should be finally determined that the same shall improperly issue or that it may award to them by reason of the granting of said order;

[fol. 21] Now, Therefore, It is Ordered that the Public Service Commission of the State of Missouri, the Highway Commission of the State of Missouri,—the Honorable Roy McKittrick, Attorney-General of the State of Missouri,—the Honorable B. M. Casteel, Superintendent of the State Highway Patrol,—be, and they are hereby, specifically restrained and enjoined, until further order of this Court from interfering with, stopping, or attempting to interfere with or stop, plaintiffs, their agents, servants, and employes, from using the streets and highways of the City of St. Louis and of the State of Missouri in interstate commerce, and from interfering with, or attempting to interfere with, plaintiffs in conducting their business of carriage of freight by motor vehicle in interstate commerce into, from, and within the State of Missouri, and from instituting, or causing to be instituted, against plaintiffs any civil action or actions to collect penalties provided for in said act of the General Assembly of the State of Missouri, referred to in the complaint filed herein, and from instituting and prosecuting, or causing to be instituted and prosecuted, any criminal action or actions under said act until the further order of the Court;

It Is Further Ordered that a copy of this order, certified under the hand of the Clerk and seal of the Court, be served on each of the defendants to be restrained hereby; and that the hearing of this cause on an application for an interlocutory injunction be had and proceeded with in accordance with Section 266 of the Judicial Code of the United States, as amended by Act of Congress.

Dated at Jefferson City, Missouri, Central Division of the Western Judicial District of Missouri, this 15th day of May, 1937.

J. C. Collet, Judge of the United States District Court for the Western District of Missouri.

Attest: A true copy.

A. L. Arnold, Clerk. By Edna D. Morris, Deputy. (Seal.)

* * * * * * *

[fol. 22] Bond on restraining order for $10,000 approved and filed May 15, 1937, omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

STIPULATION OF PARTIES—Filed May 27, 1937

(Adopted by the Court as a modification of Temporary Restraining Order)

Come now the Plaintiffs in the above-entitled cause and the Public Service Commission of Missouri, Defendant in the above-entitled cause, and hereby mutually stipulate and agree that,

Whereas, the Plaintiffs in the above-entitled cause during the Month of April, 1937, paid into the treasury of the State of Missouri, upon emergency travel orders, as provided by the rules and regulations of the Public Service Commission of Missouri, the sum of Seven Thousand One Hundred Seventy-eight and 50/100 Dollars ($7,178.50); and,

Whereas, the Plaintiffs will use the highways of the State of Missouri in the transportation of freight, for hire, and will be liable to the State of Missouri upon Annual License Fees and Emergency Travel Orders from time to time, in the event that the temporary injunction herein is dissolved, upon final hearing of this cause;

It Is Therefore Agreed That the Plaintiffs, and each of the plaintiffs, shall, within ten (10) days from the effective date of the order hereinafter mentioned, file with the Public Service Commission of Missouri and with the Bus and Truck Department of the Public Service Commission of Missouri, a report of each motor vehicle operated over the highways of the State of Missouri in the transportation of freight, in interstate commerce, giving the date, day, complete description, and actual weight carrying capacity of said vehicle, from the 15th day of May, 1937 unto this date, and for each and every day hereafter that this cause may be pending in the courts and undetermined.

Second: It is Further Stipulated and Agreed that each of the plaintiffs herein, and each carrier transporting freight

by motor vehicle over the highways of the State of Missouri in interstate commerce, who may hereafter become a party to this cause, shall file the reports heretofore referred to [fol. 24] from the 15th day of May, 1937 until such time as this suit may be finally determined in this Court or in any Court to which it may be appealed.

Third: It is Further Stipulated and Agreed that each carrier party to this suit shall apply to the Public Service Commission of Missouri for, and the Public Service Commission of Missouri shall have available and furnish, without charge, and keep accurate records thereof, a form of report to be known as "Emergency Travel Orders," in denominations of one to four tons, four to seven tons, seven to nine tons, and over nine tons of weight-carrying capacity of motor vehicle which shall be used, as hereinafter set forth, for each day's operation of vehicles so long as this order may remain in effect, unless and provided said motor vehicle carriers attach thereto an Annual License Card issued by the Commission, signed by the Secretary and attested by the seal of the Commission, to be used as follows:

1. For the purpose of identification, the Commission will cause to be placed on each travel order issued, for use in compliance with this agreement, the words, "Interstate Traffic Only."

2. Travel Orders are not to be furnished free of charge for operation of motor vehicles bearing intrastate freight.

It is Further Agreed that each of the plaintiffs severally is to issue Travel Orders, in triplicate form, for each day's operation of each separate motor vehicle, a day being defined as from 6:00 P. M. to 6:00 P. M. the following calendar day, or from 12:01 A. M. to 12:01 A. M. the following day.

It is Further Agreed that each of the plaintiffs as such motor carriers in interstate commerce only, issuing such Travel Orders, must punch the day, month and year on the margin of the Travel Order so as to indicate the date the use of the Travel Order is to begin, and place thereon the motor number of the truck or tractor used and the serial number of trailers, name of driver, actual weight-carrying

capacity of the vehicle, and other information called for on said Emergency Travel Orders.

It is Further Agreed that the postal card attached to the Emergency Travel Orders, issued by the Public Service Commission of Missouri, shall, by each of the plaintiffs in [fol. 25] said cause, be mailed to the Public Service Commission of Missouri on the date of use. The first duplicate copy is to be carried by the driver on each trip and the original white copy to be kept with the carrier's records. The postal card referred to herein shall be addressed as follows: "Public Service Commission of Missouri, Jefferson City, Missouri."

It is Further Stipulated and Agreed by the parties hereto that defendant Public Service Commission will not issue Travel Orders upon request of plaintiffs herein unless request therefor is accompanied by a certified check, cashier's check, or postal money order, payable to Roy B. Chipps, Trustee, Agent of the Plaintiffs and Interveners, in an amount equal to the amount which but for the restraining order plaintiffs would have had to pay into the treasury of the State of Missouri therefor, and defendant Public Service Commission agrees that periodically it will forward such certified checks, cashier's checks, or postal money orders, so received, to the said Roy B. Chipps, Trustee.

It being specifically understood and agreed that the Public Service Commission does not bind itself or the State of Missouri to be responsible for the collection of these checks, or money orders, or in anywise to be liable for or waive any rights to collect any amount that may be due the State of Missouri upon the final determination of this cause.

It is Hereby Further Agreed that if any one of the plaintiffs, or those who may hereafter be made plaintiffs by order of Court, shall apply to the Public Service Commission of Missouri for an Annual License or Permit without charge, upon the condition the party applying therefor shall deliver to the Public Service Commission his or their cashier's check or postal money order, payable to Roy B. Chipps, Trustee, as herein provided in reference to Emergency Travel Orders, and to be cared for and kept in such manner as provided hereinbefore as to Emergency Travel Orders.

It is Further Stipulated and Agreed that at the discretion of the Court, it may make and enter an order in accordance with the above and foregoing stipulation, that the Court

[fol. 26] may, at its discretion, modify and change the temporary restraining order to conform with this stipulation and the order entered hereunder.

B. W. LaTourette, Kenneth Teasdale, Attorneys for Plaintiffs and Intervenors. Public Service Commission of Missouri, By James P. Boyd, General Counsel, Daniel C. Rogers, Assistant Counsel.

Hannibal, Missouri, May 27, 1937.

ORDER

The temporary restraining order heretofore issued in the above entitled cause is hereby modified by consent of the parties by incorporating the entire above stipulation in said restraining order as a modification thereof.

J. C. Collet, District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PLAZA EXPRESS COMPANY, INC., ET AL., FOR LEAVE TO INTERVENE—Filed May 27, 1937

* * * * * * * *

Come now Plaza Express Company, Inc., a corporation, —Adams Transfer & Storage Company, a corporation,— Tri-state Motor Transport, Inc., a corporation,—Kaiser Truck Service, Inc., a corporation,—M-K Express Com-[fol. 27] pany, a corporation,—Fairy Crest Co., a corporation,—E. H. Hoffman Lines, Inc., a corporation,—Collinsville Transfer Company, a corporation,—Hayes Transfer & Storage Company, a corporation,—Interstate Motor Freight System, a corporation,—Commercial Freight Lines, Inc., a corporation,—Highway Motor Freight Lines, Inc., a corporation,—Acme Truck Lines, Inc., a corporation,—Byers Transportation, Inc., a corporation,—Ed Prange Doing Business as Prange Truck Service,—Everett Wheelock and Fred G. Wheelock Co-partners doing business as Wheelock Brothers,—C. B. Sharp and Ralph Sharp co-partners doing

business as Sharp Truck Lines,—Hugh L. Mitchell, Doing Business as Acme Truck Lines,—Carl A. Klem doing Business as Klem Moving & Storage Company,—L. M. Voss Doing Business as Oklahoma Trucking Exchange,—and Robert Felchia and George Youch Doing Business as Hussman & Roper Truck Service, and state that they are all engaged as common carriers by motor vehicle in the carriage of property in interstate commerce, to, from, and within the State of Missouri.

Petitioners further state that they have an interest in the subject matter of this suit in obtaining relief sought in plaintiffs' Bill, in that they are subjected to the same unlawful treatment and [harrassment] set forth in the Bill of Complaint, and suffer the same irreparable loss and damage, and will continue to do so unless afforded like protection by a restraining order, as issued against defendants in favor of plaintiffs; that because thereof it is indispensable to the preservation of their rights and status that they be permitted to intervene herein and have the benefit of injunctive relief afforded by this Court; that in petitioning herein they do so in subordination to, and in recognition of, the main proceeding.

Petitioners further state that their presence is necessary and proper to a complete, full, and final determination of the cause herein, and to a full, complete, and final preservation of their rights in the premises; that they desire to adopt the allegations in toto of the plaintiffs' bill, and desire to seek the relief sought by plaintiffs, including temporary relief heretofore granted plaintiffs, and desire to be represented by counsel representing plaintiffs, and desire [fol. 28] to contribute to the expenses and costs as plaintiffs, and be bound by the obligations incident to the status of complainants in the case.

Petitioners further state that no damage can inure to defendants by the granting of this petition, inasmuch as they are willing to, and hereby offer, to furnish a surety bond in such reasonable amount as may be ordered by the Court for the protection of defendants, and inasmuch as they are ready and willing to enter into such reasonable stipulations as may be agreed upon with reference to making of daily reports on emergency travel orders, to the end that proper records may be maintained.

Wherefore, the premises considered, Intervenors respectfully pray the Court:

First, to permit them to intervene herein.

Second, Upon filing in this cause of a surety bond in the sum of ..... Thousand Dollars ($.....) that defendants be restrained and enjoined from interfering with their operations as interstate carriers in the State of Missouri as fully and completely as defendants have been restrained and enjoined by order of the Court entered in behalf of plaintiffs in this proceeding.

Third, that they continue as parties to the litigation with the same rights and the same obligations as plaintiffs herein.

And for such other and further orders as to the Court may seem meet and just.

Kenneth Teasdale, B. W. LaTourette, Counsel for Intervenors.

Duly sworn to by Roy B. Chipps. Jurat omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE TO PLAZA EXPRESS COMPANY, INC., ET AL.—Filed May 27, 1937

This cause coming on to be heard on the application of Plaza Express Company, Inc. (A Corporation), Adams Transfer & Storage Company (A Corporation), Tri-State Motor Transport, Inc., (A Corporation), Kaiser Truck Service, Inc. (A Corporation), M-K Express Company (A Corporation), Fairy Crest Co. (A Corporation), E. H. Hoffman Lines, Inc. (A Corporation), Collinsville Transfer Company (A Corporation), Hayes Transfer & Storage Company (A Corporation), Interstate Motor Freight System (A Corporation), Commercial Freight Lines, Inc. (A Corporation), Highway Motor Freight Lines, Inc. (A Corporation), Acme Truck Lines, Inc. (A Corporation), Byers Transportation, Inc. (A Corporation), Ed Prange Doing Business As Prange Truck Service, Everett Wheelock and

Fred G. Wheelock Co-Partners Doing Business As Wheelock [fols. 30-31] Brothers, C. B. Sharp and Ralph Sharp Co-Partners Doing Business As Sharp Truck Lines, Hugh L. Mitchell Doing Business As Acme Truck Lines, Carl A. Klem Doing Business As Klem Moving & Storage Company, L. M. Voss Doing Business As Oklahoma Trucking Exchange, And Robert Felchia And George Youch Doing Business As Hussman & Roper Truck Service, Interveners in this suit to be made parties, and the petition having been duly considered, and it appearing to the Court that said Petitioners have an interest in the subject matter sufficient to enable them to become parties to this suit; It Is Therefore

Ordered, Adjudged, and Decreed that said Petitioners are hereby granted leave to intervene and become parties herein.

It is Further Ordered, Adjudged, and Decreed, upon said parties filing herein a bond in the sum of Twenty Thousand Dollars ($20,000.00), that the provisions of the Restraining order, entered herein on or about May 15, 1937, enjoining defendants from interfering with the operations of Plaintiffs as interstate carriers in the State of Missouri, shall extend to them, and for their benefit, as fully and completely as if they had been plaintiffs herein at the time of the filing of this suit.

J. C. Collet, Judge of the District Court of the United States for the Central Division of the Western Judicial District of Missouri.

Dated at Hannibal this 27 day of May, 1937.

Bond on intervention for $20,000.00 filed Sept. 8, 1937, omitted in printing.

[fol. 32] IN UNITED STATES DISTRICT COURT

DEFENDANTS' JOINT ANSWER—Filed September 17, 1937

Come now Public Service Commission of the State of Missouri, Highway Commission of the State of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney General of the State of Missouri, defendants in the above entitled cause, and for their joint answer to plaintiffs' Bill in equity respectfully state as follows:

Defendants admit the corporate and individual existence of plaintiffs as pleaded in said Bill, and further admit that

each of them is engaged in the transportation of property for hire in interstate commerce as a common carrier.

Defendants admit that the Public Service Commission of the State of Missouri is a legal entity created and established under the laws of the State of Missouri and as such is capable of suing and being sued in its official name, and admit that its principal offices are at Jefferson City, Missouri; and further admit that defendant Public Service Commission is vested with authority and jurisdiction under the laws of Missouri to supervise and regulate all motor carriers operating or doing business within the State of Missouri.

Defendants admit that the State Highway Commission of the State of Missouri is a legal entity created and established by virtue of the laws of the State of Missouri and as such is authorized to sue and be sued in its official name; and admit that defendant State Highway Commission has supervision of highways and bridges which are constructed, improved and maintained in the State of Missouri.

Defendants admit that the State Highway Commission has direction of and supervision over the Missouri State Highway Patrol, and further admit that the Missouri State Highway Patrol is authorized by the laws of the State of Missouri to patrol the public highways constructed and maintained by the aforesaid Highway Commission of Missouri, and that said patrol is authorized and empowered to [fol. 33] regulate the movements of traffic upon the public highways of Missouri and to enforce thereon the laws of the State of Missouri relating to the operation and use of vehicles on the highways thereof, and to enforce and prevent violation of all laws with reference to the use of said highways; and admit that defendant B. M. Casteel is Superintendent of the State Highway Patrol, and, as such, has command of same and directs its activities.

Defendants admit that the Honorable Roy McKittrick is the duly elected, qualified, and acting Attorney General of the State of Missouri, and, as such, is charged with the duty of enforcing the laws thereof, and is a citizen and resident of the State of Missouri, and resident within the Central Division of the Western Judicial District of Missouri.

Defendants admit that each of the defendants was, at all times herein mentioned, and still is, a resident and citizen of the State of Missouri, and of the Central Division of the Western Judicial District of Missouri.

Defendants admit that the matter in controversy exceeds as to each plaintiff, the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

Defendants admit that each of the plaintiffs is a motor carrier engaged in the business of carrying property for hire in interstate commerce over the public highways of the State of Missouri, Illinois and of other states and that each of the plaintiffs has invested in equipment and in good will in said business large sums of money, and further admit that plaintiffs severally own and operate fleets of motor trucks carrying property for hire in interstate commerce upon and over the public highways of the State of Missouri.

Defendants admit that the Fifty-Sixth General Assembly of Missouri enacted a certain act, approved on May 6, 1931, and entitled, "An Act To Repeal Article VIII of Chapter 33 of the Revised Statutes of Missouri, 1929," entitled "Transportation of Persons By Motor Vehicles," and enacted in lieu thereof a new article containing seven-
[fol. 34] teen sections, numbers 5264 to 5280, both inclusive, and further admit that said seventeen new sections as enacted constitute and are known as Article VIII of Chapter 33, Revised Statutes of Missouri, 1929, and admit that said new Article VIII provides for the supervision, regulation and licensing of the transportation of persons and property for hire over and upon the public highways of the State of Missouri by motor vehicles, and admit that said new Article VIII confers jurisdiction upon the Public Service Commission to license, regulate and supervise such motor carrier transportation, and provides for the enforcement of the provisions of said Article VIII, and for the punishment for violation thereof.

Defendants admit that under date of September 14, 1931, defendant Public Service Commission duly promulgated rules and regulations under the aforesaid new Article VIII of Chapter 33, Revised Statutes of Missouri, 1929, and adopted and approved them in a certain general order known as General Order No. 27 of said Public Service Commission, and admit that said General Order No. 27 became effective on September 15, 1931, and admit that each and every rule pleaded on pages seven to twenty-two, both inclusive, of plaintiffs' Bill were duly promulgated by defendant Public Service Commission and became effective as

aforesaid. Defendants allege, however, that the rules promulgated by defendant Public Service Commission in General Order No. 27, on September 14, 1931, have from time to time been amended, canceled and superseded, and allege that General Order No. 27-A, which was duly promulgated and became effective on April 1, 1937, a copy of which, marked Exhibit A, is filed herewith and made a part hereof, contains all of the present rules and regulations of defendant Public Service Commission promulgated under authority of the aforesaid new Article VIII of Chapter 33, Revised Statutes of Missouri, 1929, and amendments thereto; and allege that the rules and regulations contained in said General Order No. 27-A, being Exhibit A hereto attached and made a part hereof, were in full force and effect at the time plaintiffs filed their Bill and have been in full force and effect since that time.

Defendants admit that it is their duty to enforce, and that they intend to enforce, the aforesaid Article VIII of [fol. 35] Chapter 33, Revised Statutes of Missouri, 1929, and the rules and regulations of the Public Service Commission promulgated thereunder in General Order No. 27-A, and admit that such intention to require plaintiffs, and each of them to comply with the aforesaid Missouri Statutes and the rules and regulations promulgated thereunder has been communicated to plaintiffs, and each of them. Defendants deny that they have communicated to plaintiffs, or any of them, any intention affirmatively to bar or prohibit them from entering the State of Missouri or from engaging in interstate commerce therein. Defendants deny that in the enforcement of the aforesaid Missouri statutes against plaintiffs they, their agents or servants will be subjected to numerous groundless, vexatious and criminal prosecutions under the provisions of Section 5275, or under any other section or sections of the aforesaid Act of the General Assembly of the State of Missouri, and deny that plaintiffs will be illegally or unjustly subjected to a multiplicity of suits, claims and demands, civil and criminal.

Defendants deny that the aforesaid Act of the General Assembly of the State of Missouri, approved May 6, 1931, appearing at page 304 of the Laws of Missouri, 1931, is unconstitutional, null and void and is in conflict with the Federal Motor Carrier Act of 1935, and deny that the aforesaid Missouri Act is in conflict with or has been

superseded by any of the rules and regulations promulgated by the Interstate Commerce Commission pursuant to the authority vested in it under and by virtue of the aforesaid Federal Motor Carrier Act of 1935, and deny that the aforesaid Missouri Act violates the Constitution of the United States of America, and deny that they are without warrant or authority in law to enforce the aforesaid Missouri Act against plaintiffs, and each of them; and deny that, unless this Honorable Court extends equitable relief to plaintiffs, they will be without relief, and further deny that plaintiff's business, property and good will will be injured, impaired and destroyed, and further deny that in the authorized enforcement of the aforesaid Missouri Act, and the rules and regulations of the Public Service Commission promulgated thereunder, against plaintiffs they will be subjected to unjust or illegal harassment either [fol. 36] by criminal prosecutions or by proper civil action to recover the common carrier fees provided by the aforesaid Missouri Act for the use of the public highways of the State of Missouri by motor carriers, both interstate and intrastate; and deny that plaintiffs have no adequate remedy at law to protect themselves in the event suits, civil or criminal, are brought against them for non-compliance with the aforesaid Missouri law.

Defendants admit that plaintiffs operate and use their equipment, as pleaded in their Bill, within the State of Missouri in interstate commerce, but deny that the enforcement of the aforesaid Act of the General Assembly of Missouri, and of the rules and regulations of the Public Service Commission promulgated thereunder by General Order No. 27-A, constitutes an interference with the rights of the Congress of the United States to regulate commerce among the several states, and deny that enforcement of the aforesaid Missouri Act constitutes an unreasonable burden upon interstate commerce, and deny that the aforesaid Missouri Act, and the rules and regulations of the Missouri Public Service Commission promulgated thereunder in General Order No. 27-A are in conflict with the Federal Motor Carrier Act, 1935, or in conflict with the various rules and regulations promulgated by the Interstate Commerce Commission pursuant to said Federal Motor Carrier Act, and deny that the enforcement of the aforesaid Missouri Act is and would be in violation of

Section 8 of Article I of the Constitution of the United States of America.

Defendants admit that the aforesaid Federal Motor Carrier Act of 1935 vests in the Interstate Commerce Commission the regulation of the transportation of passengers or property by motor carriers engaged in interstate commerce and admit that said Federal Act imposes upon the Interstate Commerce Commission the duty to regulate common carriers by motor vehicle in interstate commerce to the end that said Interstate Commerce Commission may establish, promulgate and prescribe reasonable rules, regulations and procedure for the effective administration of said Federal Motor Carrier Act. Defendants admit that at divers times the Interstate Commerce Commission, pursuant to the aforesaid Federal Motor Carrier Act of 1935, [fol. 37] has promulgated rules and regulations with reference to the duty and obligation of common carriers in interstate commerce concerning the necessity of providing liability insurance, and providing for rules and regulations for qualifications of employees and for safety of operation and equipment of common carriers by motor vehicles, and with reference to various other matters and things relating to the operation of common carriers by motor vehicles in interstate commerce. Defendants allege, however, that it is the duty of the plaintiffs to plead specifically each and every rule of the Interstate Commerce Commission promulgated under authority of the Federal Motor Carrier Act of 1935, which they contend have superseded the aforesaid Missouri Act and the rules and regulations of the Public Service Commission promulgated thereunder, or which they contend are in conflict with the aforesaid Missouri Act or rules and regulations of the Public Service Commission.

Defendants admit that under the provisions of the Federal Motor Carrier Act of 1935 the Interstate Commerce Commission has the sole and exclusive power to issue certificates of convenience and necessity to motor carriers desiring to conduct a transportation business in interstate commerce; deny that the aforesaid Act of the General Assembly of Missouri is in any respect in conflict with said Federal Motor Carrier Act of 1935; deny that it is unconstitutional, null and void; deny that by the enforcement of the aforesaid Missouri Act the Congress of the

United States would be deprived of the right to regulate commerce among the several states, and deny that the enforcement of the aforesaid Missouri Act is, or would be in violation of, Section 8 of Article I of the Constitution of the United States.

Defendants deny that Section 5266 of the aforesaid Act of the General Assembly of the State of Missouri in providing for a schedule of fees to be paid by all motor carriers, interstate and intrastate, who use the public highways of Missouri, is in conflict with any of the provisions of the aforesaid Federal Motor Carrier Act of 1935; deny that the provisions of the aforesaid Missouri Act, which confers upon the defendant Public Service Commission the power and authority to license, supervise and regu- [fol. 38] late motor carriers and to approve rates, charges and classifications, and to promulgate rules and regulations governing such carriers, and prescribing systems of accounting and providing for filing various reports, are in conflict with any of the provisions of the aforesaid Federal Motor Carrier Act of 1935; deny that Section 5268 of the aforesaid Missouri Act, requiring motor carriers using the public highways in the State of Missouri for the transportation of property in interstate commerce, to secure an interstate permit from defendant, is in conflict with Sections 206 and 207 of the Federal Motor Carrier Act of 1935; deny that Section 5273 of the aforesaid Missouri Act, requiring motor carriers to file liability insurance policies with defendant Public Service Commission, is in conflict with Section 215 of the aforesaid Federal Motor Carrier Act of 1935; deny that Section 5274 of the aforesaid Missouri Act authorizing defendant Public Service Commission to make safety rules and regulations for the operation of motor vehicles upon and over the public highways of Missouri, is in conflict with Section 204, or in conflict with any other section, of said Federal Motor Carrier Act of 1935.

Defendants admit that on or about August 3, 1936, the Interstate Commerce Commission promulgated rules with reference to the filing and approval of surety bonds and policies of insurance by motor carriers engaged in interstate commerce, but defendants deny that any of the provisions of the aforesaid Missouri statutes or of the rules of the Public Service Commission promulgated thereunder, as contained in defendant's General Order No. 27-A, marked Exhibit A, filed herewith and made a part hereof,

are in conflict with the aforesaid rules and regulations of the Interstate Commerce Commission pertaining to surety bonds and policies of insurance, and deny that the aforesaid Missouri Act or the rules of the Public Service Commission promulgated thereunder with reference to surety bonds and insurance policies imposes increased demands or unreasonable burdens upon plaintiffs or upon their operations as motor carriers in interstate commerce.

Defendants admit that on or about December 23, 1936, the Interstate Commerce Commission promulgated rules and regulations with reference to lighting requirements, [fol. 39] qualifications of employees, safety of operation in equipment of common carriers engaged in interstate commerce, but deny that any of the rules and regulations promulgated by the Public Service Commission of Missouri under authority of the aforesaid Missouri statute imposes increased demands or places unreasonable burdens upon plaintiffs and upon their operations as motor carriers in interstate commerce.

Defendants admit that on or about December 23, 1936, the Interstate Commerce Commission promulgated rules and regulations concerning brakes and braking equipment required of common carriers by motor vehicle engaged in interstate commerce, but deny that any of the rules and regulations of the Public Service Commission promulgated under the aforesaid Missouri statute impose increased demands or place unreasonable burdens upon plaintiffs and upon their operations as motor carriers in interstate commerce.

Defendants admit that the Interstate Commerce Commission has promulgated regulations governing the construction and filing of common carrier freight rate and classification publications, and supplements thereto, and particularly admit that the Interstate Commerce Commission did, under date of January 6, 1936, effective January 8, 1936, promulgate such rules and regulations, and did on November 7, 1936, effective January 1, 1937, issue Supplement No. 1 to the aforesaid regulations. Defendants deny, however, that any of the rules and regulations of defendant Public Service Commission of Missouri, promulgated under its General Order No. 27-A, impose increased demands or place unreasonable burdens upon plaintiffs or upon their operations as common carriers in interstate commerce.

Defendants admit that Section 5272 of the aforesaid Missouri Act provides that every motor carrier, whether operating in interstate or intrastate commerce, shall, at the time of the issuance of a certificate of convenience and necessity for operation in intrastate commerce, or at the time of the issuance of an interstate permit for operation in interstate commerce, and annually thereafter, pay an annual license fee ranging from Twenty-Five Dollars [fol. 40] ($25.00) to Five Hundred Dollars ($500.00), for the maintenance and repair of the public highways of Missouri; admit that said section provides a penalty and forfeiture of ($500.00) Five Hundred Dollars to the State of Missouri to be collected from any motor carrier using the highways of the State of Missouri in interstate transportation without securing an interstate permit and without paying the prescribed license fees for the use of the public highways of the State of Missouri, and admit that the aforesaid penalty and forfeiture similarly applies against interstate common carriers who operate over the public highways of the State of Missouri without securing a bond or insurance policy as prescribed in the aforesaid Missouri Act. Defendants deny that Section 5272, or any part thereof, of the aforesaid Missouri Act is null and void. Defendants further admit that Section 5272 of the aforesaid Missouri Act provides that where a motor carrier is operating within Missouri and an adjoining state and the total mileage of its operations upon and over the public highways of the State of Missouri is ten miles or less, the annual license fee shall be one-third of the annual license fee regularly provided for; admit that said section further provides that where a motor carrier is operating a route in this State, the total mileage of which is not greater than twenty miles, the annual license fee shall be one-half of the annual license fee regularly provided for. Defendants deny that the Interstate Commerce Commission has the sole and exclusive power to issue permits to motor carriers using the public highways in interstate transportation of persons or property, or both, and deny that the Interstate Commerce Commission has any authority whatsoever to fix the fees for the use of the public highways of Missouri in interstate commerce; deny that the Interstate Commerce Commission has the sole and exclusive power to require and regulate the furnish-

ing of bonds and insurance policies by motor carriers using the public highways of the State of Missouri in interstate commerce; deny that the license fees provided in Section 5272 of the aforesaid Missouri Act for the use of the public highways of the State of Missouri are so connected with the issuance of certificates of convenience and necessity and/or interstate permits that the provisions are not separable; deny that said entire Section 5272 is in con- [fol. 41] flict with the Federal Motor Carrier Act of 1935; deny that said Section 5272 is unconstitutional, null and void and deprives the Congress of the United States of the right to regulate commerce among the several states, and deny that said Section 5272 is in violation of Section 8 of Article I of the Constitution of the United States. Defendants deny that the aforesaid Missouri Act confers upon defendant Public Service Commission the power to issue certificates of convenience and necessity to motor carriers for authority to engage in interstate commerce, and deny that defendant Public Service Commission has ever presumed to require motor carriers engaged exclusively in interstate commerce to make application to defendant Public Service Commission for certificates of convenience and necessity. Defendants admit that the exclusive authority to issue certificates of convenience and necessity to interstate motor carriers is vested in the Interstate Commerce Commission. Defendants deny that the issuance of interstate permits, only for the purpose of identifying interstate motor carriers in the enforcement of the state police powers, is in conflict with the Federal Motor Carrier Act of 1935, and deny that the issuance of said interstate permits is unconstitutional or is in conflict with any of the provisions of the Constitution of the United States.

Defendants deny that the license fees provided in the aforesaid Missouri Act for motor carriers engaged in interstate commerce, and the license fees provided in cases where an interstate motor carrier is operating within Missouri and an adjoining state with a total mileage over the public highways of Missouri of ten miles or less, and the license fees in cases where a motor carrier is operating over the public highways of the State of Missouri in interstate commerce a total mileage not in excess of twenty miles, are unconstitutional, null and void; deny that said fees bear no

reasonable relation to the use and the extent of the use of the public highways in the State of Missouri by such interstate motor carriers; deny that the fees therein provided for are excessive and grossly excessive; deny that said fees constitute an unreasonable burden on interstate commerce or upon the operations of plaintiffs engaged in interstate commerce; deny that the amount of the fees so provided for [fol. 42] is not based upon the amount or the extent of the use of public highways in the State of Missouri; deny that said fees constitute mere arbitrary charges and burdens upon interstate commerce and against the operations of plaintiffs in interstate commerce, and deny that the fees so imposed upon plaintiffs are in violation of Section 8 of Article I of the Constitution of the United States.

Defendants deny that the provisions of the aforesaid Missouri Act or of the duly promulgated rules and regulations of the Public Service Commission thereunder are in conflict with the Federal Motor Carrier Act of 1935, insofar as said Missouri Act or said rules and regulations relate to the transportation of property in interstate commerce, and deny that by the application of said rules against interstate motor carriers defendant Public Service Commission is violating the provisions of said Federal Motor Carrier Act or the rules and regulations of the Interstate Commerce Commission promulgated thereunder, or Section 8 of Article I of the Constitution of the United States.

Defendants admit that, as heretofore pleaded, they intend to enforce the provisions of the aforesaid Missouri Act, and the duly promulgated rules of the Public Service Commission thereunder against the plaintiffs, their servants, agents and employees, in accordance with their respective authorities so to do, but deny that plaintiffs, their agents, servants and employees, in the enforcement of the aforesaid Missouri Act, will be subjected to a multiplicity of groundless civil suits and suits to collect penalties and forfeitures, and deny that plaintiffs, their agents, servants and employees will be subjected to numerous and groundless criminal prosecutions, and deny that plaintiffs will be harassed in their business and property, and deny that their business rights, property rights and good will will be impaired, injured and destroyed, and deny that plaintiffs will suffer immediate and irreparable injury, loss and damage.

Defendants admit that plaintiffs, and each of them, for a long time have been, and are now, daily and hourly,

receiving shipments of property to be transported into, from [fol. 43] and within the State of Missouri in interstate commerce, but deny that the enforcement of the aforesaid Missouri Act against plaintiffs will impair their right to accept, transport and deliver shipments in interstate commerce, and deny that plaintiffs will be impaired in their ability to fulfill the duties and obligations imposed upon them by law as common carriers in interstate commerce to the extent that they will become liable to numerous losses and suits, claims, and demands by various shippers and consignees in amounts far in excess, as to each plaintiff, of the sum of Three Thousand Dollars ($3,000.00), and deny that the enforcement of the aforesaid Missouri Act against plaintiffs, or any of them, will impair their status as common carriers under the Federal Motor Carrier Act of 1935.

Defendants deny that irreparable loss and damage will result to plaintiffs unless a temporary restraining order is granted herein, and deny that irreparable loss and damage will result to plaintiffs unless an interlocutory injunction is granted.

Defendants deny that the enforcement of the aforesaid Missouri Act against plaintiffs will deprive them of their property without due process of law, take their property without compensation, and deny to them the equal protection of the law, and deny that the enforcement of the aforesaid Missouri Act against plaintiffs will deprive them of their rights under Amendments 5 and 14 of the Constitution of the United States of America, and deny that the enforcement of the aforesaid Missouri Act against plaintiffs will violate their rights under the Constitution of the State of Missouri, particularly under Article II, Sections 4, 21 and 30 thereof.

Wherefore, defendants, and each of them, pray this Court to dismiss the Bill of Complaint, and for such other equitable relief as to this Court may seem just and proper.

Public Service Commission of the State of Missouri, Highway Commission of the State of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol, Roy McKittrick, Attorney Gen- [fol. 44] eral of the State of Missouri, Defendants, by James P. Boyd, General Counsel, Public Service Commission of the State of Missouri. Daniel C. Rogers, Assistant Counsel, Public Service Commission of the State of Missouri, Solicitors for Defendants.

COUNTERCLAIM

Defendant Public Service Commission having answered plaintiffs' Bill of Complaint does by this its separate counterclaim complain against the plaintiffs hereinafter named, and alleges as follows:

(1) In their sworn Bill of Complaint plaintiffs have alleged that they are operators of motor vehicles using the public highways of the State of Missouri in interstate commerce, but, notwithstanding, certain of said plaintiffs, who are hereinafter named, have wholly failed to pay to the Treasurer of the State of Missouri the license fees, as set out in the aforesaid Article VIII, Chapter 33, Revised Statutes of Missouri, being known as the Missouri Bus and Truck Act, enacted by the Fifty-sixth General Assembly of the State of Missouri, appearing at pages 304-316, both inclusive, of the Laws of Missouri, 1931, and amendments thereto. Defendant Public Service Commission alleges that at all times, during the more than six years since the effective date of the aforesaid Missouri Bus and Truck Act, plaintiffs hereinafter mentioned have neglected, failed and refused to pay to the State of Missouri the license fees provided by the aforesaid Missouri Bus and Truck Act.

(2) The failure and refusal of said plaintiffs to pay said license fees was wilful and unlawful and was done for the purpose of defrauding the State of Missouri of said license fees. Because of the fact that most of said plaintiffs are non-residents of the State of Missouri, process cannot be served upon them in this State unless they maintain offices for the transaction of business in Missouri or can be found [fol. 45] here. Neither the courts of the sister states nor the United States courts located in such states have jurisdiction to entertain suits brought by the State of Missouri or its officers for the purpose of recovering the aforesaid license fees.

(3) Public Service Commission is without specific knowledge as to the number of vehicles which plaintiffs hereinafter mentioned have operated upon and over the public highways of the State of Missouri in interstate commerce since the aforesaid Missouri Bus and Truck Act became effective on or about September 15, 1931. Neither does defendant Public Service Commission know the actual

weight carrying capacity in tons of said vehicles. All of said facts are within the knowledge of said plaintiffs.

(4) The amounts due and payable in license fees as aforesaid are not unliquidated, but are liquidated, definite and certain sums which could be accurately determined upon a proper accounting. Although such account could be accurately stated, if the facts were at hand, the taking of said account would be long and complicated.

(5) Because of the premises, defendant Public Service Commission is without an adequate or efficient remedy at law and, therefore, brings this counterclaim in equity.

(6) Wherefore, said defendant Public Service Commission prays as follows:

(a) That this Court will take jurisdiction of said counterclaim in equity.

(b) That upon a full hearing the Court will enter a decree or decrees for the amount of said license fees due to the State of Missouri from the following plaintiffs, respectively:

Acme Truck Lines, Inc.
Collinsville Transfer Company
Dohrn Transfer Company
Egyptian Express
Fairy Crest Co.
Robert Felchia and George Youch, D/B/A Hussman & Roper Truck Service
E. F. Frey Company
[fol. 46] Hayes Freight Lines, Inc.
Hayes Transfer & Storage Company
E. H. Hoffman Lines, Inc.
Hussman & Roper Freight Lines, Inc.
Interstate Dispatch, Inc.
Interstate Motor Freight System
Kern, Inc.
Carl A. Klem, D/B/A Klem Moving & Storage Company
Lucido Bros. Grocery Company, Inc.
Midland Truck Line, Inc.
Night Hawk, Inc.
Ed Prange D/B/A Prange Truck Service
Robinson Motor Lines
R. A. Sand, D/B/A Sand Motor Express

Schwartz Truck Terminal
Service Lines, Inc.
William Shadalov, Doing Business as Overnight Freight Service
C. B. Sharp and Ralph Sharp, D/B. A Sharp Truck Lines
St. Louis Eastern Truck Lines, Inc.
St. Louis Forwarding Company
Western Trucking Company, Inc.
Wilson Truck Company

(c) That the Court, after a full hearing, shall dismiss the Bill of Complaint for want of equity.

(d) That the Court shall grant any other equitable relief which it may deem just and proper.

Public Service Commission of the State of Missouri, by James P. Boyd, General Counsel, Daniel C. Rogers, Assistant Counsel, Solicitors.

IN UNITED STATES DISTRICT COURT

GENERAL DENIAL OF PLAINTIFFS TO COUNTERCLAIM—Filed September 22, 1937

Come now plaintiffs referred to in Counter Claim of defendant Public Service Commission of the State of Missouri, and for their Answer to said Counter Claim deny [fol. 47] each and every allegation, statement and thing therein contained.

Wherefore, having fully answered, plaintiffs pray to go hence with their costs.

B. W. LaTourette, Kenneth Teasdale, Attorneys for Plaintiffs.

IN UNITED STATES DISTRICT COURT

DEFENDANTS' SUPPLEMENTARY ANSWER—Filed January 31, 1938

Come now defendants and file this, their supplementary answer to plaintiffs' Bill in Equity, and for their supplementary answer state that defendant Public Service Com-

mission at a session of said Commission held in its office in Jefferson City, Missouri on the 15th day of November, 1937, pursuant to the authority vested in said Commission by the Missouri Bus and Truck Law, approved May 6, 1931 and found on pages 304 to 316, inclusive, of Laws of Missouri 1931, with amendments thereto, did promulgate certain rules and regulations governing the operation of motor carriers and contract haulers in the transportation of persons or property for hire by motor vehicles upon and over the public highways of the State of Missouri; that said rules are numbered as Rules Nos. 1 to 71, inclusive; that said rules numbered 1 to 71, inclusive, as thusly promulgated are known as General Order No. 33; that said General Order No. 33 containing the aforesaid rules numbered 1 to 71, inclusive, together with the aforesaid Missouri Bus and Truck Act are hereto attached and made a part hereof, as defendants Exhibit B.

Defendants further state that the aforesaid General Order No. 33 became effective on the first day of January, 1938, and is now in full force and effect, except as hereinafter stated, and as provided by the terms of said General Order No. 33 Rules Nos. 1 to 71, inclusive, thereof supersede, cancel and annul all previous general orders, rules and regulations promulgated by defendant Public Service Commission under authority of the aforesaid Missouri Bus and Truck Law.

[fol. 48] Defendants state that on the 29th day of December, 1937, defendant Public Service Commission made an order, which became effective on the first day of January, 1938, wherein Rule No. 23 of General Order No. 33, attached hereto in printed pamphlet form and made a part hereof, was suspended and the effective date thereof postponed until a public hearing thereon can be held before defendant Public Service Commission; that Rule No. 14-B of General Order No. 27-A, which became effective on April 1, 1937, was by the aforesaid recent order of the Public Service Commission, effective January 1, 1938, substituted for and in the place of Rule No. 23 as same now appears in General Order No. 33; that said Rule No. 14-B is now in full force and effect.

Defendants further state that Public Service Commission by another order effective on the first day of January, 1938 duly amended Rule No. 51 as contained in General Order

No. 33, attached hereto in printed pamphlet form and made a part hereof; by striking out of paragraph (a) of said Rule No. 51, pertaining to working hours of employees, the word "continuously"; that paragraph (a) of said Rule No. 51 of General Order No. 33 was amended to read as follows:

"No motor carrier controlling, operating or managing any motor vehicle used in the transportation of passengers or property shall cause or allow any driver or operator of such motor vehicle to work as a driver or operator for a longer period than ten hours and whenever any such driver or operator shall have been on duty driving or operating for ten hours, he shall be relieved and not required or permitted again to go on duty driving or operating until he has had at least 10 consecutive hours off duty, also that in cases of unforeseen emergency a driver may remain on duty not in excess of twelve hours."

Defendants state that the aforesaid Rules Nos. 1 to 71, inclusive, of General Order No. 33, attached hereto in printed pamphlet form and made a part hereof, with amendments mentioned, are not in conflict with the rules and regulations promulgated by the Interstate Commerce Commission under authority of the Federal Motor Carrier Act of 1935, and state that the aforesaid Missouri rules are [fol. 49] not superseded by any rules promulgated by the Interstate Commerce Commission; that said Missouri rules are in full harmony with similar rules promulgated by the Interstate Commerce Commission; that the Missouri rules do not constitute a burden upon interstate commerce, and further state that the Missouri rules are not unconstitutional, null and void as pleaded by plaintiffs in their Bill.

Public Service Commission of the State of Missouri; Highway Commission of the State of Missouri; B. M. Casteel, Superintendent of Missouri State Highway Patrol; Roy McKittrick, Attorney General of the State of Missouri, Defendants, by James P. Boyd, General Counsel, Public Service Commission of the State of Missouri; Daniel C. Rogers, Assistant Counsel, Public Service Commission of the State of Missouri, Solicitors for Defendants.

IN UNITED STATES DISTRICT COURT

OPINION HANDED DOWN JUNE 15, 1938—Filed June 15, 1938

Per CURIAM:

Action to restrain state agencies from enforcing the Missouri Bus and Truck Law and particularly Section 5272, Revised Statutes of Missouri, 1929, as amended by Laws Mo. 1931, page 311.

Plaintiffs are interstate motor carriers. By Sec. 5272, supra, all common carriers of freight for hire by motor vehicles having a weight-carrying capacity of more than one and one-half tons are required to pay an annual license fee to the State of Missouri. The amount of the fees increase progressively as follows:

[fol. 50]

More than 1½ and not more than 2 tons	$25.00
More than 2 and not more than 3 tons	65.00
More than 3 and not more than 4 tons	100.00
More than 4 and not more than 5 tons	135.00
More than 5 and not more than 6 tons	175.00
More than 6 and not more than 7 tons	225.00
More than 7 and not more than 8 tons	275.00
More than 8 and not more than 9 tons	350.00
More than 9 tons	500.00

These fees apply alike to interstate and intrastate carriers. In addition to these fees which apply only to trucks operated as common carriers for hire, a tax characterized as a registration fee is levied upon all trucks and passenger vehicles whether used for private or commercial purposes. Section 5272 also provides that an interstate carrier which is operating over a route ten miles or less of which is in Missouri, shall be required to pay only one-third of the above fees, and if such route be twenty miles or less the fee is one-half the above amount.

Plaintiffs concede that the State of Missouri has the power to levy and collect compensatory fees from interstate motor carriers without transgressing the Commerce clause of the Constitution, but attack the Missouri Statute upon the grounds that the fees fixed are (a) unreasonable and discriminatory and (b) inoperative by reason of the fact

that Congress has taken over the regulation of interstate motor carriers by the enactment of the Motor Carrier Act of 1935.

In support of the charge that the fees are unreasonable and excessive, plaintiffs offered evidence to the effect that the typical type of concrete highway in Missouri is the lightest and cheapest type practical for use by passenger vehicles and hence no part of the original cost of the highways should be charged to trucks in determining the amount of fees all trucks should pay in order to recompense the state for the cost to the state of the use of its highways by trucks. Evidence was also offered tending to show that high type roads of the type of Missouri highways do not depreciate from traffic of no greater weight than the statutory load limits, but only depreciate from the combined effect of traffic and natural forces. It is asserted arguendo [fol. 51] that no depreciation should be allocated to truck traffic.

Both of the above arguments are based upon the assumed but unsupported false premise that since the highways were constructed primarily for uses other than truck traffic and therefore would have been constructed of the same type regardless of whether trucks might thereafter use them, upon the advent of the use of the highways by trucks there could be no allocation of any part of the original cost to truck traffic. Several fallacies are involved in that reasoning. Among them is the false assumption that the state constructed its highways for the purpose of accommodating any one or more specific classes of traffic. Although an expressed declaration to that effect is probably unnecessary to so classify them, the Missouri highways are expressly declared to be public highways and hence open from their establishment and construction to all proper uses and by all classes of the traveling public. Again, plaintiffs' argument seems to assume that truck traffic was either non-existent or its existence ignored by the state in the consideration of the necessity or advisability of the construction of the present highway system. There is no basis for either assumption. The hypothesis is inaccurate for the further reason that it assumes that the state has no right to anticipate new uses of its highway facilities which will share the burden of construction, depreciation, and maintenance. For these reasons and possibly many others, plaintiffs' contention that no part of the original cost or

depreciation of the highways may be properly considered in determining the reasonableness of the amount of the fees charged is untenable.

The argument and supporting evidence is presented to the effect that maintenance costs are not increased by heavy truck traffic. Neither the argument or the evidence is convincing when the plaintiffs also advance the theory that the extent of depreciation from motor vehicles is in direct proportion to total mileage and the weight of the vehicle. Although a distinction be recognized between depreciation and maintenance, yet it does not appear logical that the weight of a truck may be a factor in causing depreciation [fol. 52] and not be a factor in creating maintenance expenses.

The further contention is made that the maintenance expense of the entire highway system should not be included in determining the maintenance expense chargeable to plaintiffs when plaintiffs only use a comparatively small percentage of the whole. Plaintiffs have the burden of showing the unreasonableness of the fee and a fortiori the burden is upon them to show the unreasonableness and injury of the method used in determining the amount of the fee. They do not show what a fair fee would be if the base were restricted as they contend it should be, nor do they show that they are prejudiced by the inclusion of the entire highway system in the base, because if its total cost is included, likewise its total income must be included, which has not been done.

With the principle established that a reasonable fee for the use of the highways should include a fair part of the original cost, depreciation, maintenance, and policing, we pass to the determination of the contention that plaintiffs individually and as a class are assessed more than a reasonable amount for those purposes.

Individually, plaintiffs insist that their uses of the highways vary greatly in amount as between themselves and also as compared to other classes of carriers such as intrastate operators, and that since their use of the highways differ in amount, different fees should be charged. Within certain limits a tax such as this must be recognized as a privilege tax. Administrative difficulties may lay in the way of collecting a tax upon an exact mileage basis and there is nothing unreasonable or oppressive in a fee for the privilege for a use as extensive as the carrier desires

to make it. It is therefore immaterial that one may pay less for the greater use of the same privilege so long as each plaintiff is not charged an unreasonable fee for the use of their privilege. Aero Mayflower Transit Co. vs. Public Service Commission, 295 U. S. 285. Morf vs. Bingaman, 298 U. S. 407.

Collectively, plaintiffs assert that the amount paid by interstate motor carriers bears no reasonable relation to [fol. 53] the total amount of the use of the highways by such carriers.

The same principles apply to plaintiffs individually and as a class. The burden is upon them in either case to demonstrate that the legislative action complained of is without rational basis. Aero Mayflower Transit Co. vs. Public Service Commission, supra. South Carolina State Highway Department vs. Barnwell Bros., Inc., U. S. Supreme Court, decided Feb. 14, 1938, 82 L. Ed. (Adv.) 469, 58 S. Ct. (Adv.) 510.

Plaintiffs have offered no evidence from which it appears that the legislature has erred in establishing its schedule of fees.

It is next contended that the fees are invalid as a matter of law because they are assessed on a flat rate annual basis, do not vary according to mileage traveled, and are not predicated upon the use made of the highways. In effect this is the same contention considered above. In addition to that which has already been said on the subject it is appropriate to note that the fees assessed are asserted by the Legislature to be for the sole purpose of maintenance, and proper care of the highways (Section 5272 (a), R. S. Mo. 1929, as amended by Laws Mo. 1931), (Art. IV, Section 44a, Missouri Constitution). Under the facts of this case such cases as Ingels vs. Morf, 300 U. S. 290, Interstate Transit, Inc., vs. Lindsey, 283 U. S. 183, and Sprout vs. South Bend, 277 U. S. 163, are inapplicable.

It is next contended that the fees charged are unreasonable because they do not increase in direct proportion to the increase in the weight carrying capacity of the vehicle. Upon that point plaintiffs' expert testimony was to the effect that no rational method has been devised by which an approximate estimate may be made of the relative destructive effect of traffic and natural forces or the relative destructive effect of heavy and light loads. He stated that

in his opinion the most rational assumption is that the destructive effect of traffic loads combined with natural forces, is in direct proportion to the magnitude of the loads. [fol. 54] However valuable such an expert opinion might be to a legislative body clothed with ample authority to determine the scientifically precise fee plaintiffs should pay, such a criterion is not one which a court may adopt in determining the constitutionality of an act of the Legislature and such evidence is insufficient to sustain a charge that a legislative act is unconstitutional because not based on any rational theory.

It is asserted that the schedule of fees is discriminatory because of the exemption of trucks of a capacity of not more than one and one-half tons carrying capacity. It was for the Legislature to determine where the line of exemption should be drawn, and no question of denial of the equal protection of the law is presented. Carley & Hamilton vs. Snook, 281 U. S. 66.

Discrimination is further charged because the license fees levied by Section 5272 apply only to common carriers and not to private or contract carriers. There is no proof of the extent of use of the highways by private or contract carriers. A sufficient distinction between uses of highways for private and contract carrier uses and uses as a common carrier exists to defeat that charge of discrimination. Liberty Highway Co. vs. Public Utilities Commission, 294 Fed. 703. Clark vs. Poor, 274 U. S. 554. Bekins Van Lines vs. Riley, 280 U. S. 80.

The contention that the assessment of a fee of one-third the usual amount for operations less than ten miles in length within the state and one-half the usual amount where the operation is twenty miles or less, is unreasonable, is without merit. Continental Baking Co. vs. Woodring, 286 U. S. 352. Especially is this true in view of the provision of Section 5268 (b) relating to the issuance of temporary permits to interstate carriers for "occasional trips" into or through the state.

The remaining contention is to the effect that the entire Missouri Act is now inoperative by reason of the passage of the Motor Carrier Act of 1935, Title 49 U. S. C. A., Section 301-327. There seems to be no necessity to inquire into [fol. 55] the extent to which Congress by its statutes (Title 49, U. S. C. A. 301-327), and the regulations of the Inter-

state Commerce Commission pursuant thereto has occupied the field of interstate transportation as pertains to service, accounting, operation and equipment. The state has an undoubted right to exact a compensatory fee for the use of its highways and interstate carriers are not exempt from that charge. The Missouri Act has a separability clause, Section 5278, and the other provisions would still remain effective as applied to intrastate carriers and it cannot be presumed that the Legislature of the state would not have enacted the statute just as it is, conceding it would not apply to interstate carriers except as to charging them fees for the use of the highways. Congress recognized that states would continue to assert their power to tax interstate carriers for their use of their highways as it provided in Section 302-(c) that nothing should be construed to affect the powers of taxation of the several states. Carley & Hamilton vs. Snook, 281 U. S. 66.

Since plaintiffs have failed to show that interstate commerce is unduly burdened and have failed to show any unconstitutional discrimination against them, it is unnecessary to consider plaintiffs' objections to the consideration of defendants' "cost study."

For the reasons stated, plaintiffs' bill should be dismissed on the merits.

Defendants should submit formal findings of fact and conclusions of law in conformity with the views expressed in this opinion. Plaintiffs are allowed an exception.

Archibald K. Gardner, Circuit Judge. J. C. Collet, District Judge. Merrill E. Otis, District Judge.

Dated this 15th day of June, 1938.

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law—Filed July 2, 1938

This cause came on regularly to be heard before this specially constituted district court of three judges, Honorable Archibald K. Gardner, Circuit Judge, Honorable J. C. Collet, District Judge, and Honorable Merrill E. Otis, Dis-

trict Judge, convened in accordance with the statutes applicable thereto, on the 24th day of September, 1937, with continued hearing on the 31st day of January, 1938, at Kansas City, Missouri. Plaintiffs appeared by their counsel, Kenneth Teasdale, B. W. La Tourette, and Paul G. Koontz. Defendant Public Service Commission of Missouri appeared by its counsel, James H. Linton and Daniel C. Rogers. Defendant State Highway Commission of Missouri appeared by its counsel, Louis V. Stigall and Wilkie B. Cunnyngham. The defendants, B. M. Casteel, Superintendent of the Missouri State Highway Patrol, Honorable Lloyd C. Stark, Governor of the State of Missouri, and Honorable Roy McKittrick, Attorney-General of the State of Missouri, appeared by their counsel, Covell R. Hewitt. Interveners Atchison, Topeka and Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; the Kansas City Southern Railway Company; Missouri-Kansas-Texas Railroad Company; Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, J. M. Kurn and John G. Lonsdale, Trustees of St. Louis-San Francisco Railway Company, Berryman Henwood, Trustee of St. Louis Southwestern Railway Company; Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, appeared by their counsel, [fol. 57] Joseph H. Hays, F. H. Moore, Carl S. Hoffman, and Amos M. Mathews. Intervener City of St. Louis, Missouri, appeared by its counsel, John G. Burkhardt. Intervener Missouri Municipal Association appeared by its counsel, George A. Spencer. Evidence having been fully submitted, oral argument of counsel had, and printed briefs having been submitted as directed, the court being now duly advised in the premises makes the following findings of fact and enters the following conclusions of law, pursuant to Equity Rule Number 70½.

Findings of Fact

1. Plaintiffs are engaged in interstate commerce as common carriers of property by motor vehicle upon the public highways of Missouri, and some of them are duly authorized so to operate under the provisions of the Motor Carrier Act, 1935, 49 U. S. C. 301-327. In the conduct of

such businesses, each of the plaintiffs operates motor trucks of more than one and one-half tons carrying capacity.

2. Plaintiffs seek to enjoin defendants from enforcing against plaintiffs Sections 5264 to 5280, as amended, both inclusive, Revised Statutes of Missouri, 1929, known as "Missouri Bus and Truck Law", and the rules of the Public Service Commission of Missouri made under the authority thereof. Plaintiffs' proof and argument were directed to the proposition that the annual license fees provided to be paid by Section 5272 cannot be lawfully enacted of the plaintiffs, being invalid by reason of the Commerce Clause and 14th Amendment of the Constitution of the United States.

3. Plaintiffs attack the Missouri statutes on the grounds that the fees in question are (a) unreasonable and discriminatory, and (b) inoperative by reason of the fact that Congress has taken over the regulation of Interstate motor carriers by enactment of the Motor Carrier Act, 1935. They specifically claim that the statute is unconstitutional for the following reasons: because the fees are excessive in amount; because they bear no reasonable relation to the extent of the use of the highways; because they are graduated not directly in proportion to weight but progressively with higher rates per ton for vehicles of greater weight carrying [fol. 58] capacity; because trucks of not more than one and one-half tons weight carrying capacity are exempted; because private carriers are exempted, including those operating not for hire and contract carriers operating for hire but not for public hire; because trucks traveling different annual mileages must pay the same annual fees; because interstate carriers whose total route mileage in Missouri is not more than ten miles pay one-third of such annual fees, and those whose total route mileage in Missouri is not more than twenty miles pay one-half of such annual fees; and because the power of the State of Missouri to require such annual fees of interstate motor carriers has been superseded by The Congress of the United States in the enactment of the Motor Carrier Act, 1935, 49 U. S. C. 301-327.

4. In addition to the fees under attack here, which apply only to trucks operated as common carriers for hire, by the provisions of Sections 7761 and 7763, Revised Statutes

of Missouri, 1929, a registration fee is levied upon all trucks and passenger vehicles whether used for private or commercial purposes and by the terms of other statutes a tax of two cents per gallon is levied upon all gasoline consumed in the operation of motor vehicles upon the public highways. Neither this registration fee nor gasoline tax is challenged in this proceeding.

5. The schedule of annual license fees provided in Section 5272 and which is assailed by plaintiffs is as follows, based upon weight carrying capacity.

More than 1½	and not more than 2 tons	$25.00
More than 2	and not more than 3 tons	65.00
More than 3	and not more than 4 tons	100.00
More than 4	and not more than 5 tons	135.00
More than 5	and not more than 6 tons	175.00
More than 6	and not more than 7 tons	225.00
More than 7	and not more than 8 tons	275.00
More than 8	and not more than 9 tons	350.00
More than 9	tons	500.00

Defendants urged, in oral arguments, briefs and evidence offered, as a proper basis to support the legislative judgment in fixing such fees in the amounts as aforesaid, that [fol. 59] (a) the proper compensable elements of annual highways costs include: The aggregate investment in improvements on highways and streets amortized annually over their service lives; interest on the unamortized portion of such investment; the annual cost of maintenance, policing and administration; a charge representing taxes foregone on the capital so invested; and a charge for the use of the land occupied; and (b) that not less than fifty per cent of such annual cost of streets, sixty-six per cent of such annual cost of local roads and ninety per cent of such annual cost of state highways may properly be charged to motor vehicles as a class; and (c) that such portion of such annual cost, properly chargeable to motor vehicles as a class, is assignable to the respective vehicles in accordance with the average weight of each vehicle and the average miles it travels, and (d) that such fees fixed in said Section 5272 are lesser in amount but fairly representative of the sums arrived at by considering the foregoing elements and factors after resignation fees and gasoline taxes are credited.

6. Plaintiffs have failed to sustain the burden of proving that the Legislature erred in establishing the schedule of fees in question or that such schedule of fees or the basis of their calculation on the above or some other proper plan within the discretion of the legislature is unreasonable, unjust or constitutes an undue burden on interstate commerce.

7. The Missouri highways are public highways and are and have been open, from the time of their establishment and construction, to all proper uses and by all classes of the traveling public and a statutory fee charged for the use of such highways, on the premise that all classes of vehicle users, including trucks, should participate in defraying their cost, is not unreasonable nor arbitrary because trucks are included as one of the classes required to contribute to original and subsequent costs.

8. In the establishment and construction of its highway systems, the State of Missouri recognized the truck traffic then in existence and that which might reasonably be contemplated; had a right to do so; and a statute enacted pursuant to that right and anticipating future uses of its [fol. 60] highway facilities and levying fees which would require such new uses to share the burden of the original cost of such facilities is not unreasonable nor arbitrary because truck traffic by common carriers, whether in existence at the time such highways were built or developed since that time, is subject to such fees.

9. The weight of a truck and the miles that it travels are pertinent factors in causing depreciation of pavement, structures and other elements of public highways and may be properly considered as an element of comparative cost in fixing fees for highway use which are higher for heavier vehicles than for lighter ones.

10. Plaintiffs have failed to prove their contention that highway maintenance cost is not increased by the traffic of heavy trucks. The weight of a truck and the miles it travels are factors in creating maintenance expense and pertinent and proper factors to be considered in fixing fees for highway use which are higher for heavier vehicles than for lighter ones.

11. The license fees under consideration here, registration fees and gasoline tax constitutes substantially the en-

tire income of the State from the use of its highway system; such income is derived from the use by vehicles of all local and state roads and city streets and it is impossible to segregate the income derived by the State from the use of the separate classes of thoroughfares; since the reasonableness of the fees may be determined by the comparison of the aggregate income which they produce with the aggregate cost of the facilities required to produce it, and since the income produced by specific segments of the highway system cannot be identified and must therefore be considered collectively, it is reasonable and proper to include the cost of the entire highway system, as distinguished from specific segments thereof, in calculating the amount and determining the reasonableness of fees for highway use; and Section 5272 is not unreasonable nor oppressive because the method of arriving at the amounts therein specified may have included the cost of and income derived from the entire system, taking into consideration average costs and average use.

[fol. 61] 12. The fees provided in Section 5272 are levied as compensation for the privilege of the use of Missouri highways which use is as extensive as the carriers who pay such fees desire to make. There is nothing in the statutes under attack which limits the number of miles a vehicle may be operated and the routes in Missouri being used by plaintiffs and other interstate carriers are those of their own selection. There is no proof of any refusal by the State of Missouri to allow plaintiffs or any of them permission to use any highway and it may not be assumed that any such use would be denied in the future.

13. Plaintiffs have failed to prove that there exists any rational method of approximately estimating the relative destructive effect on highway traffic and natural forces or the relative destructive effect of heavy and light loads and have failed to prove that the judgment of the legislature in fixing fees progressively higher for heavier loads is unjust, unreasonable or oppressive.

Conclusions of Law

1. The court has jurisdiction of the parties and of the subject matter of this action.

2. One who assails a statute which fixes a schedule of fees as compensation for highway use, on the ground that

it is unreasonable, arbitrary and discriminatory and constitutes an undue burden on interstate commerce, has the burden of proving the unreasonableness of the fees and the unreasonableness and injury of the method used in determining the amount of the fees and of proving the existence of unconstitutional discrimination as a matter of fact.

3. In the absence of proof of an exact method of calculating highway costs in their relation to vehicle use, the subject lies within the broad realm of legislative discretion and the burden rests upon one attacking a statute fixing such fees to prove that the legislative action complained of is without any rational basis.

4. Within certain limits the fees by Section 5272 are a tax for the privilege of using the highways of Missouri and, in the absence of proof that they are unreasonable in amount as compensation for such privilege, the purpose to which the legislature applies the proceeds of the tax and [fol. 62] the relationship of the tax to the cost of policing and administration are immaterial.

5. Administrative difficulties in the collection of a tax varying in amount with exact mileage traveled are sufficient to sustain the exaction of a flat annual fee in the absence of proof that such flat annual fee is unreasonable in amount.

6. There exists a sufficient distinction between the use of public highways for private and contract carrier uses and the use of such highways as a common carrier to sustain their separate classification and treatment, and Section 5272 is not discriminatory because it applies only to common carriers.

7. Common carriers of property by motor vehicle, regularly operating over certain selected highways only, can be required to pay fixed, annual license fees, and the cost of all of the highways of the state may be included in the basis for fixing such license fees.

8. The license fees required by said Section 5272 are not discriminatory or otherwise invalid because they increase in amount progressively and not proportionally to the authorized weight-carrying capacity of the vehicle.

9. The exemption of trucks of one and one-half tons and less of weight-carrying capacity is valid.

10. The provisions of the statute that an interstate motor carrier whose total route mileage in the state is not more than ten miles must pay one-third of the fees in question, and that a carrier whose total route mileage is not more than twenty miles in the state must pay one-half of the fees, are not unreasonable or discriminatory and are valid.

11. The power of the defendants and the State of Missouri to require the license fees in question has not been superseded by the Congress of the United States in enacting the Motor Carrier Act, 1935, 49 U. S. C. 301-327.

12. The relief asked by plaintiffs should be denied and plaintiffs' Bill of Complaint should be dismissed with prejudice.

[fol. 63] To all of the foregoing, plaintiffs except and are duly allowed exceptions.

Done this 2nd day of July, 1938.

Archibald K. Gardner, Circuit Judge. Merrill E. Otis, District Judge. J. C. Collet, District Judge.

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER AND COUNTERCLAIM—Lodged July 26, 1938

Come now Public Service Commission, Honorable Roy McKittrick, Attorney General of the State of Missouri, Honorable Lloyd C. Stark, Governor of the State of Missouri, and the State Highway Commission, defendants in the above entitled cause, and file this amended answer and counterclaim against each and all plaintiffs for fees owing by them to the State of Missouri for the use of its public highways, and state that plaintiffs' liability to the State of Missouri for such fees has occurred since the filing of plaintiffs' Bill in equity, to-wit, since May 15, 1937.

Defendants state that plaintiffs, since the aforesaid fifteenth day of May, 1937, have failed and refused to pay fees to the State of Missouri for the use of its public highways as common carriers, as provided by law, and have failed and refused to comply with and obey the provisions of the temporary restraining order for the deposit of fees which would be owing and payable by each of them to the

State of Missouri by law except for the effectiveness of the temporary restraining order. Defendants further state and allege that plaintiffs, and each of them, have continued to operate upon and over the public highways of the State of Missouri daily large numbers of trucks carrying property as common carriers or motor carriers in interstate commerce, in disobedience of the temporary restraining order and the laws of Missouri, as aforesaid.

In particular, defendants allege that the aforesaid disobedience of the law and of the provisions of the temporary [fol. 64] restraining order, and the failure of plaintiffs to deposit fees in custody of the trustee, as contemplated under the temporary restraining order, have been committed by each and every one of the plaintiffs in all of their interstate transportation operations within the ten and twenty mile zones mentioned in Section 5272 of the Missouri Bus and Truck Law, appearing at pages 304-316, both inclusive, Laws of Missouri, 1931.

Defendants state that plaintiffs and each of them do now, and will at the determination of this cause of action, owe the State of Missouri large amounts of money in the nature of fees for the use of its public highways since the effective date of the temporary restraining order, which amounts of money, except for the effectiveness of the temporary restraining order, would have been payable by each and every plaintiff as fees, under the provisions of Section 5272 of the Missouri Bus and Truck Law aforesaid, for the use of the public highways of the State of Missouri.

Defendants state that the number of trucks and the times and places of their operation upon and over the highways of the State of Missouri, within the ten and twenty mile zones, constitute information wholly within the knowledge of the plaintiffs and state that they do not have access to plaintiffs' records nor do they possess other means for determining the amount of money owing by plaintiffs to the State of Missouri, and state that only by an accounting conducted under the supervision of this Court may defendants in behalf of the State of Missouri have an adequate remedy for recovery of the aforesaid fees.

Defendants specifically allege that the aforesaid liability of the plaintiffs to the State of Missouri for fees for the use of its highways arises out of the transaction which is the subject matter of plaintiffs' Bill in equity and further allege that except for the effectiveness of the temporary

restraining order of this Court and the continuing disobedience thereof by plaintiffs, the fees herein mentioned would have been by law owing and payable by plaintiffs, and each of them, to the State of Missouri.

Because of the premises defendants are without an adequate or efficient remedy at law and therefore [being] this counterclaim in equity.

[fol. 65] Wherefore, defendants pray the Court to take jurisdiction of this amended counterclaim as an action in equity and further pray the Court to provide the means and remedy whereby the moneys owing by plaintiffs and each of them to the State of Missouri may be equitably and accurately determined and for such other relief in the premises as the Court may deem just and proper.

Public Service Commission of the State of Missouri, by James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel; Honorable Roy McKittrick, Attorney General of the State of Missouri, by Covell R. Hewitt, Assistant Attorney General; Honorable Lloyd C. Stark, Governor of the State of Missouri, by Covell R. Hewitt, Assistant Attorney General; Highway Commission of the State of Missouri, by Louis U. Stigall, General Counsel.

SUGGESTIONS IN SUPPORT OF JURISDICTION OF AMENDED COUNTERCLAIM

In Case No. 660, In Equity, styled Frank Eichholz vs. Sam O. Hargus, et al. (not yet published in Advance Sheet), in this same division of the United States District Court, a three-judge court took jurisdiction of a counterclaim which also has for its purpose the recovery of fees for the use of the Missouri highways.

In the Eichholz case the reasons for the court taking jurisdiction of the counterclaim were less favorable than here. In that case defendant Public Service Commission had revoked the interstate permit of Eichholz. While operating thereafter under the protection of a temporary injunc- [fol. 66] tion he had failed to pay fees due the State. The court held that it had jurisdiction of the counterclaim, and appointed a special master to proceed with the taking of evidence to determine the amount of fees owing by Eichholz to the State.

The following extract from the Eichholz case is pertinent here:

"4. The defendant has filed a supplemental pleading wherein there is a prayer for an accounting of fees accumulated during the operations of the plaintiffs since the granting of the original restraining order, December 31, 1936.

While the injunction granted by this court prohibited the defendant Public Service Commission from revoking and cancelling plaintiff's permit as an interstate carrier, such injunction in nowise relieved the plaintiff of the obligation to pay statutory or prescribed license fees. No reason appears why such payments should not have been made. On the contrary, there is every reason why the plaintiff in a proceeding in equity should not meet all of the reasonable exactions of the state as condition precedent to the operations carried on by him.

Under Equity Rule 30, a defendant has a right to interpose a counter-claim 'arising out of the transaction which is the subject-matter of the suit.' It is doubtful whether these claims arose out of the transaction which is the subject-matter of the suit, and, yet, because of the injunction, the plaintiff elected to discontinue the payment of fees.

"No objection having been made to the filing of the counterclaim, this court will not interpose one under the circumstances of the case. The question having been presented, it should be considered by us.

In Piedmont & N. Ry. Co. vs. Query, 56 F. (2d) 172, loc. cit. 175, the court said in discussing similar questions:

'And if either of these is a substantial question under the Constitution, we must proceed with the consideration of the other questions presented; for in such case the jurisdiction of the court extends to every question involved, [fol. 67] whether of federal or state law, even though the court may not find it necessary to decide the federal question.'

In Sovereign Camp, W. O. W. vs. Murphy, 17 F. S. 650, l. c. 652, a case like this heard before three judges sitting in the Southern District of Iowa, the court said:

'But the duty imposed on the three-judge court * * * carries with it the duty on the part of the same three-judge court to try the whole case. The parties cannot be

relegated to piecemeal trials of the several issues joined by them in their case.'

The same principle was announced in Greene vs. Louisville Railroad, 244 U. S. 499, loc. cit. 508, where the court said that:

"The jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case. Including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all.'

In view of the above, unless the parties can agree after an inspection of the records upon the amount of the accumulated fees, it will be necessary to appoint a master to take an accounting and make his report to the court."

Without comment thereon the attention of the Court is also directed to Equity Rules 19, 30 and 34. It would seem that these rules do not contemplate the filing of a counterclaim of this nature until the occurrence of it has been completed or nearly so. The occurrence of increasing indebtedness to the State of Missouri by the plaintiffs will not be completed until the State is no longer restrained in the enforcement of its law against plaintiffs. It is the position of defendants, therefore, that this amended counterclaim is timely filed. It is the conviction of defendants that the subject matter of the counterclaim arises directly out of the disobedience of the temporary restraining order by plaintiffs. Therefore, the subject matter of the counterclaim is within the jurisdiction of the Court.

A casual inspection of Section 263 of the subject, Courts, in the Federal Digest shows that many cases have been [fol. 68] decided by three-judge courts in which questions other than the one directly relating to the grant or refusal of the injunction were involved.

For example, a three-judge district court in the case of Georgia S. & F. Ry. Co. vs. Georgia P. S. C., 289 F. 878, held that,

"Where a suit involves a federal question which gives a federal court jurisdiction, such jurisdiction extends to the determination of all questions involved in the case, including questions of state law, irrespective of the disposi-

tion made of the federal question, or whether it is found necessary to decide it at all."

Again, in the case of M. W. A. vs. Casados, 15 Fed. Supp. 483, l. c. 486, a three-judge district court said:

"Jurisdiction of a three-judge court, as in other cases, must be determined by the facts well pleaded in the bill; it cannot depend upon the decision eventually reached. Jurisdiction so existing, a three-judge court, like other courts, will decide the controversy on the ground it deems to be correct, state or federal; the law does not demand that any case be tried piecemeal."

A similar holding is found in a three-judge district court decision in 51 F. (2d) 573 (El Paso & S. W. R. Co. vs. Arizona Corporation Commission), as follows:

" 'The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.' "

Jurisdiction of counterclaims by district courts has been upheld not only by the circuit courts of appeals but by the United States Supreme Court. See Frank Moore vs. New York Cotton Exchange, 70 L. Ed. 750, 270 U. S. 593.

If is the contention of defendants that although a three-judge court performs a special duty, as provided by Sec- [fol. 69] tion 380 of the Judicial Code, it is nevertheless a court of equity, subject to the customary procedure allowable in courts of equity.

Respectfully submitted, Public Service Commission of the State of Missouri, by James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel; Honorable Roy McKittrick, Attorney General of the State of Missouri, by Covell Hewitt, Assistant Attorney General; Honorable Lloyd C. Stark, Governor of the State of Missouri, by Covell Hewitt, Assistant Attorney General; Highway Commission of the State of Missouri, by Louis U. Stigall, Chief Counsel.

In United States District Court, Western District of Missouri, Central Division

No. 665

In Equity

Brashear Freight Lines, Inc., et al., Plaintiffs,

vs.

Public Service Commission of Missouri, et al., Defendants;

The Atchison, Topeka and Santa Fe Railway Company, et al., Interveners

Final Decree—Filed August 4, 1938.

This cause came on to be heard before this specially constituted district court of three judges, duly convened according to law, on the 24th day of September, 1937, with continued hearing on the 31st day of January, 1938, at [fol. 70] Kansas City, Missouri. Temporary restraining order, restraining defendants as prayed in plaintiff's bill of complaint, issued on the 15th day of May, 1937, and by stipulation of counsel for the parties, approved by the court, it was agreed that the temporary restraining order should remain in effect until final decision on the merits of the relief asked in plaintiffs' bill of complaint and that hearing on plaintiffs' application for temporary and permanent injunction should be consolidated.

Upon the issues made by plaintiffs' bill of complaint and the answers of the defendants and interveners thereto, the evidence having been fully submitted, arguments of counsel having been made and printed briefs filed, and the court having heretofore filed and entered its findings of fact and conclusions of law in favor of the defendants, and the court being now fully advised, It Is Ordered, Adjudged and Decreed, as follows:

1. That the plaintiffs are not entitled to a permanent injunction against the defendants;

2. That the relief prayed for in plaintiffs' bill of complaint should be and is hereby in all respects denied, and plaintiffs' bill of complaint is hereby dismissed on its merits;

3. That the temporary restraining order heretofore granted to plaintiffs by this court against the defendants, be and the same hereby is dissolved;

4. That the issue raised by the defendants' counterclaim, not having been urged nor presented by the parties, and the court being in doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them, shall be so advised.

5. That defendants recover their costs and disbursements herein, to be taxed as provided by law and inserted herein in the sum of ..... Dollars.

To all of the foregoing plaintiffs except, and their exception is hereby allowed.

[fol. 71] Dated this 3rd day of August, 1938.

Archibald K. Gardner, Circuit Judge; J. C. Collet, District Judge; Merrill E. Otis, District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR REHEARING AND MOTION TO MODIFY THE DECREE —Filed September 3, 1938

Now come defendants in the above entitled cause and file this pleading requesting the Court

First, to grant a rehearing in said cause in order that defendants may be given an opportunity to try the issues made upon the counterclaim and the answer of plaintiffs thereto;

Second, to grant a rehearing for the purpose of allowing defendants to present two contempt motions which have long since been pending before the Court and which have not been given any consideration by it;

Third, to modify paragraph numbered 4 on the second page of the decree of the Court.

Wherefore, defendants pray the Court to grant a rehearing in said cause for the purpose of (1) trying the issues made upon the counterclaim and the answer thereto, (2) presentation of contempt motions, and (3) modifying para-

graph 4 of the decree, eliminating therefrom the statement that defendants failed to urge and present the counterclaim.

James H. Linton, General Counsel, Daniel C. Rogers, Assistant Counsel, Solicitors for Defendants.

[fol. 72] SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION

In support of defendants' motion for rehearing and motion to modify the decree, the following is respectfully submitted:

First: Defendants state that the original counterclaim in said cause was filed on September 17, 1937, as a part of defendants' joint answer, and further state that plaintiffs' general denial thereto was filed on September 23, 1937.

In paragraph numbered 4 of the decree of the Court, the Court has dismissed the counterclaim with the following statement:

4. "That the issue raised by the defendants' counterclaim, not having been urged nor presented by the parties, and the court being in doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them, shall be so advised."

Defendants state that the Court is in error in stating that the counterclaim was not urged nor presented by the parties. When the case was tried on its merits on January 31, 1938, counsel for defendant Public Service Commission, during the preliminaries preceding the presentation of the evidence, brought the matter of the counterclaim and the contempt motions to the attention of the Court, as follows:

Transcript of Proceedings,

January 31, 1938,

Volume II, pp. 131-136

"Mr. Rogers: * * * * * * * *

Now, if the Court please, I wish to draw attention to a matter which was not brought to the attention of the

Court when we were here last time, and that is the defendants have filed here since the Bill was introduced, of course, two contempt motions. One of these contempt motions [fol. 73] alleged that approximately thirty of these plaintiffs have never complied with the temporary restraining order of this Court by failing to file the reports that were contemplated by the temporary restraining order. The other contempt motion is against the considerable number of the plaintiffs, I cannot state at this time the number, for another violation of the temporary restraining order, in that after they were obliged, under the terms of the temporary restraining order, to carry travel orders on their trucks they did not have travel orders on their trucks as they were inspected from time to time by the police officers of the State of Missouri.

Now, the second part of our defense is a counterclaim. The counterclaim of the Public Service Commission is to this effect, that inasmuch as there are approximately thirty of these plaintiffs who have never complied with the Missouri Bus and Truck Act and who, however, have come in as plaintiffs and admit that they are using our highways, have never even to this day, and contrary of course to the temporary restraining order, have used our highways and, therefore, if the issues should be against the plaintiffs, these approximately thirty would owe the State of Missouri sums of money, and the knowledge concerning the sums of money is wholly within their possession because we have no records whatever of them in the Public Service Commission in Jefferson City. So, in effect, the counterclaim of the defendants outlines these facts and states to the court, as it were, that owing to the nature of the determination of the amounts of these plaintiffs would owe the State, we think the appointment of a Master would really be necessary in order to find out what they owe the State. Now, this is somewhat maybe in the nature of a suggestion; I make it, and the Court will take it for what you think it is worth. It seems to me of course that if the plaintiffs should prevail in this suit and our bus and truck fees should be declared invalid, then morally speaking, I assume is the correct word to use, that we would have no accounting against these plaintiffs on this counterclaim at some future time. Although the plaintiffs have already technically violated the provisions of the temporary restraining order, in

the spirit of leniency I would be willing to suggest to the Court that should the truck and bus fees under the Missouri [fol. 74] law be declared invalid that while we would still have that technical complaint against them that they violated your temporary restraining order, yet if you should declare these fees invalid, our two contempt motions probably would be more or less insipid as having no real substance in them against these plaintiffs, which leaves me, after that explanation, to ask the Court to consider whether or not you would prefer that we go ahead with the principal issues here with reference to the cost study and this conflict of Federal and State laws and leave the two contempt motions and the counterclaim for a later setting.

Judge Otis: A later setting would not be necessary if the plaintiffs prevail in the principal suit, according to your theory.

Mr. Rogers: That is probably true, Your Honor, but we would leave that to the Court to determine. I am of that opinion, though. If I may say just a word further so the court may know, we are here prepared to try this case on the part of the defendants in such manner as the Court feels that we are entitled to.

* * * * * * *

Mr. Teasdale: May it please the Court. Referring to the last subject first, I think myself that the issues that might be brought out by the counterclaim, if it ever becomes pertinent, should be deferred to another time and we should not attempt to consider them now. The same may be said as to the motions for contempt. It would take rather an involved hearing to decide upon those and their relevancy may change later.

* * * * * * *

Judge Gardner: We may clear a part of it now. The cross complaint and contempt motions in this case, if the Court should sustain the position of the defendants, we will retain jurisdiction of these matters, but will not hear them now."

In support of the proposition that the counterclaim arises out of the transaction which is the subject matter of the [fol. 75] suit or that it is the subject matter of an independent suit in equity, reference is made to the case of

Frank Moore vs. New York Cotton Exchange, 70 L. Ed. 750, 270 U. S. 593. Therein the appellant, who appealed from the order of the district court dismissing his bill, alleged that the exchange had refused to furnish him with a certain telegraphic service on cotton quotations and asked for a mandatory injunction compelling the exchange to furnish such service to him. Appellees filed a counterclaim alleging that appellant was already purloining its cotton quotation service from another source and asked for an order enjoining appellant from further purloining such service. The district court dismissed appellant's bill on the merits and issued a permanent injunction against appellant compelling it to cease in its practices of purloining appellees' cotton quotations. The Court said that "transaction" is a word of flexible meaning. It held that the counterclaim was an action in equity arising out of the transaction which is the subject matter of the suit. It is a case directly in point here.

Second. The Court will recall that two contempt motions were pending at the time the case was tried on the merits on January 31, 1938. That these two motions were called to the attention of the Court at that time has heretofore been mentioned in the quotations from the transcript of the evidence. These motions are important, and should be disposed of in an orderly way by the Court. If permitted to expire by default, injury will have been done to the cause of motor carrier regulation. Trifling with the reasonable orders of the Court should not be condoned, and the defendants are acting with due deliberation in now urging that the Court give due attention to the contempt motions.

Third. Regardless of what conclusion the Court may reach with reference to taking jurisdiction of the counterclaim, and hearing the contempt motions, it is respectfully urged to correct paragraph numbered 4 of its decree by striking therefrom the erroneous statement that defendants neither urged nor presented their counterclaim. Convicted by the Court of neglect in presenting the counterclaim, defendants would be unfairly prejudiced thereby upon [fol. 76] appeal. The least that the Court should do on this motion is to modify its paragraph 4 of the decree.

Respectfully submitted,

James F. Linton, General Counsel; Daniel C. Roger, Assistant Counsel, Solicitors for Defendants.

In United States District Court

[Title omitted]

Order Modifying Decree and Overruling Petition for Rehearing—Filed September 16, 1938

The petition for rehearing and motion to modify the decree herein having been duly presented and considered by the court,

It Is Now Ordered that Section 4 of the decree as entered herein by and the same hereby is modified to read as follows:

4. That as to the issue raised by defendants' counterclaim, the court being in serious doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they or either of them shall be so advised.

It Is Further Ordered that the petition for rehearing be and the same hereby is denied and overruled.

[fol. 77] Defendants are allowed an exception to the above rulings.

Dated this 15th day of September, A. D. 1938.

Archibald K. Gardner, Circuit Judge; Merrill E. Otis, District Judge; J. C. Collet, District Judge.

In United States District Court

[Title omitted]

Statement of the Evidence—Filed November 28, 1938

As this is an appeal from the Decree of the District Court dismissing Defendants' Counterclaim and refusing to allow them to file an Amended Counterclaim, most of the evidence upon which the appeal is based is found on the face of the pleadings of the case, as follows:

Seventy-six (76) plaintiffs joined in the Bill in Equity filed on May 15, 1937. All of them were engaged in trans-

porting property by motor vehicles in interstate commerce over the public highways of the State of Missouri.

In their Bill in Equity plaintiffs challenged the validity of the fees provided by the aforesaid Missouri Bus and Truck Law for the use, maintenance and repair of the state highways, on the ground that such fees were excessive and bore no reasonable relation to plaintiffs' use of the highways. They sought therein to restrain the Public Service Commission and other defendants from enforcing said Act against themselves, and from collecting from themselves the fees provided in the State Act.

Stipulation of the parties was, on May 27, 1937, adopted by the Court as a modification of its temporary restraining [fol. 78] order issued on May 15, 1937. All of the plaintiffs were thereby required to deposit the state fees falling due for use of the public highways of the State of Missouri with a named trustee until final determination of the injunction on the merits. On or before May 27, 1937, plaintiffs filed two indemnifying bonds, one for $10,000 and one for $20,000, to protect defendants and the State of Missouri against damages resulting from the injunction, if it should be dissolved.

On July 1, 1937, defendant Public Service Commission filed its motion to cite plaintiffs for non-compliance with the provisions of the modified temporary restraining order, wherein the charge was made that none of the thirty (30) plaintiffs mentioned therein had complied with the temporary restraining order, as modified.

The Counterclaim filed on September 17, 1937, being a part of Defendants' Joint Answer, reveals that thirty (30) of the seventy-six (76) plaintiffs, at no time since the enactment of the Missouri Bus and Truck Law, appearing at pages 304-316, both inclusive, of Laws of Missouri 1931, applied for interstate authority from the Missouri Public Service Commission to use the public highways of Missouri in interstate commerce or paid any fees to the State of Missouri for such use either before or after filing of the Bill in Equity.

It was further pleaded in the Counterclaim that most of the thirty (30) plaintiffs named therein were non-residents of the State of Missouri; that the Commission was without knowledge of the numbers or carrying capacities of the vehicles operated by plaintiffs; that such facts were within

the knowledge of plaintiffs; that the Commission was without adequate or efficient remedy at law and therefore had brought its action in the Counterclaim in equity. The prayer of the Counterclaim was for the District Court to take jurisdiction of the Counterclaim in equity and after a hearing thereon enter a decree for the amount of license fees owing by plaintiffs to the State of Missouri, and for any other equitable relief which may seem just and proper.

On September 22, 1937, plaintiffs filed a General Denial to the Counterclaim.

[fol. 79] At the trial on the merits of plaintiffs' Bill, in which a permanent injunction was prayed, on January 31, 1938, counsel for Public Service Commission and the Court engaged in a colloquy wherein the Court announced that upon consideration of the nature of the Counterclaim and the Contempt Motion, it would defer any hearing upon the Counterclaim or Contempt Motion until its decision on the merits should be rendered. Such colloquy is as follows:

Transcript of Proceedings, January 31, 1938, Volume II, pp. 131-136

* * * * * * *

"Mr. Rogers:

Now, if the Court please, I wish to draw attention to a matter which was not brought to the attention of the Court when we were here last time, and that is, the defendants have filed here, since the Bill was introduced, of course, two contempt motions. One of these contempt motions alleged that approximately thirty of these plaintiffs have never complied with the temporary restraining order of this Court by failing to file the reports that were contemplated by the temporary restraining order. The other contempt motion is against the considerable number of the plaintiffs, I cannot state at this time the number, for another violation of the temporary restraining order, in that after they were obliged, under the terms of the temporary restraining order, to carry travel orders on their trucks they did not have travel orders on their trucks as they were inspected from time to time by the police officers of the State of Missouri.

Now, the second part of our defense is a counterclaim. The counterclaim of the Public Service Commission is to this effect, that inasmuch as there are approximately thirty

of these plaintiffs who have never complied with the Missouri Bus and Truck Act and who, however, have come in as plaintiffs and admit that they are using our highways, have never even to this day, and contrary of course to the temporary restraining order, have used our highways and, therefore, if the issues should be against the plaintiffs, these approximately thirty would owe the State of Missouri sums of money, and the knowledge concerning the sums of money [fol. 80] is wholly within their possession because we have no records whatever of them in the Public Service Commission in Jefferson City. So, in effect, the counterclaim of the defendants outlines these facts and states to the Court, as it were, that owing to the nature of the determination of the amounts *of* these plaintiffs would owe the State, we think the appointment of a Master would really be necessary in order to find out what they owe the State. Now, this is somewhat maybe in the nature of a suggestion; I make it, and the Court will take it for what you think it is worth. It seems to me of course that if the plaintiffs should prevail in this suit and our bus and truck fees should be declared invalid, then morally speaking, I assume is the correct word to use, that we would have no accounting against these plaintiffs on this counterclaim at some future time. Although the plaintiffs have already technically violated the provisions of the temporary restraining order, in the spirit of leniency I would be willing to suggest to the Court that should the truck and bus fees under the Missouri law be declared invalid that while we would still have that technical complaint against them that they violated your temporary restraining order, yet if you should declare these fees invalid, our two contempt motions probably would be more or less insipid as having no real substance in them against these plaintiffs, which leaves me, after that explanation, to ask the Court to consider whether or not you would prefer that we go ahead with the principal issues here with reference to the cost study and this conflict of Federal and State laws and leave the two contempt motions and the counterclaim for a later setting.

Judge Otis: A later setting would not be necessary if the plaintiffs prevail in the principal suit, according to your theory.

Mr. Rogers: That is probably true, Your Honor, but we would leave that to the Court to determine. I am of that

opinion, though. If I may say just a word further so the Court may know, we are here prepared to try this case on the part of the defendants in such manner as the Court feels that we are entitled to.

* * * * * * *

[fol. 81] Mr. Teasdale: May it please the Court. Referring to the last subject first, I think myself that the issues that might be brought out by the counterclaim, if it ever becomes pertinent, should be deferred to another time and we should not attempt to consider them now. The same may be said as to the motions for contempt. It would take rather an involved hearing to decide upon those and their relevancy may change later.

* * * * * * *

Judge Gardner: We may clear up part of it now. The cross complaint and contempt motions in this case, if the Court should sustain the position of the defendants, we will retain jurisdiction of those matters, but will not hear them now."

On July 26, 1938, defendants lodged with the clerk of the Court their Amended Answer and Counterclaim. It was signed not only by the Public Service Commission, but by the Attorney General of the State of Missouri, acting as one of the defendants. The Amended Answer and Counterclaim was also signed by the General Counsel of the Highway Commission of the State of Missouri, also a defendant named in plaintiffs' Bill.

It was averred in the Amended Counterclaim that since the filing of plaintiffs' Bill in Equity on May 15, 1937, each and every one of the seventy-six (76) plaintiffs had failed and refused, thirty (30) completely and forty-six (46) partly, to comply with the provisions of the temporary restraining order requiring deposit of license fees, although all of plaintiffs had continuously used the public highways of the State of Missouri as motor carriers engaged in interstate commerce since the filing of said Bill. It was averred that plaintiffs did then and would at the termination of the case owe to the State of Missouri large amounts of money in the nature of license fees for the use of its public highways, which amounts, except for the effectiveness of the

temporary restraining order, would have been payable by each and every one of the seventy-six (76) plaintiffs as fees under the provisions of Section 5272 of the Missouri Bus and Truck Law. It was averred that the number of [fol. 82] trucks and the times and places of their operation upon the highways of Missouri constituted information wholly within the knowledge of plaintiffs, and that only by an accounting conducted under the supervision of the District Court could defendants in behalf of the State of Missouri have an adequate remedy for recovery of the fees owing to the State by plaintiffs. It was specifically averred that the liability of plaintiffs to the State of Missouri for fees arose out of the transaction which is the subject matter of plaintiffs' Bill in Equity and that except for the effectiveness of the temporary restraining order and the continued disobedience thereof of plaintiffs, the license fees provided by the Missouri Act would have been due and payable to the State of Missouri. The prayer of the Amended Counterclaim asked the Court to take jurisdiction thereof as an action in equity, and to provide the means and remedy whereby the moneys owing by plaintiffs, and each of them, to the State of Missouri may be equitably and accurately determined and for such other relief as the Court may deem just and proper.

The original Counterclaim sought to collect fees due and payable by only thirty (30) plaintiffs whom defendants then knew to be in complete non-compliance with all provisions of the aforesaid Missouri Bus and Truck Law, including payment of the statutory fees. The Amended Counterclaim sought to broaden the claim of the State of Missouri for fees by including therein the failure of all seventy-six (76) plaintiffs, thirty (30) completely and forty-six (46) partly, to pay certain fees to the State of Missouri which became due and payable after the filing of plaintiffs' Bill in Equity.

In its original Decree, filed on August 4, 1938, the Court, in paragraph 4 thereof, dismissed the Counterclaim. No opportunity or hearing of any kind was afforded defendants to present the Counterclaim to the Court on the merits thereof.

Petition for rehearing and motion to modify the decree, with suggestions, was filed on September 3, 1938, wherein defendant Public Service Commission prayed the Court for either

[fol. 83] (1) a rehearing for the purpose of allowing defendants to try the issues made upon the counterclaim and the General Denial of plaintiffs thereto,

or

(2) .....

(3) to modify paragraph 4 of the Decree of the Court.

On September 15, 1938, the Court modified paragraph 4 of its Decree and again dismissed the Counterclaim. The modified paragraph reads as follows:

4. That as to the issue raised by defendants' counterclaim, the court being in serious doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they or either of them shall be so advised.

It is from such dismissal that this appeal is prosecuted.

Respectfully submitted, James H. Linton, General Counsel. Daniel C. Rogers, Assistant Counsel. Missouri Public Service Commission. Counsel for Appellants.

Approved Jan. 7-1939. J. C. Collet.

Service of the above Statement of Evidence is hereby acknowledged this 26th day of November, 1938.

Kenneth Teasdale, Counsel for Appellees.

[fol. 84] In United States District Court

Motion of Defendants for Costs—Filed December 15, 1938

Now come defendants Public Service Commission and State Highway Commission and move the Court to allow them, respectively, costs in the above entitled cause, as follows:

I Costs Incurred by Defendant Public Service Commission

Travel Expenses of Daniel C. Rogers:

May 27, 1937 Jefferson City to St. Louis to Hannibal ..... $ 21.70

(Conference in St. Louis with counsel for plaintiffs on Stipulation, and trip to Hannibal where Judge Collet modified temporary restraining order by including therein the Stipulation.)	
Sept. 23, 1937 Jefferson City to Kansas City (Trial on merits, presentation of plaintiffs' case only.)	23.80
Dec. 13, 1937 Jefferson City to Chicago, Illinois (Interview with Messrs. Dean Marston, Glover, Older and Attorney General of Illinois, concerning defendants' cost study brief for Missouri highways.)	34.25
Jan. 31, 1938 Jefferson City to Kansas City (Trial on merits, presentation of defendants' case.)	26.30
Printing Defendants' Brief (50 copies)	96.22
Transcript of Evidence (Anna Feltenstein)	146.95
Attorneys' Fees	1000.00
Total	$1349.22

II Costs Incurred by State Highway Commission

Witness Costs:

Dean Anson Marston (costs in bringing to trial)	$ 25.86
Tom Kennedy " " " " "	22.40
Earl J. Ward " " " " "	22.40
Arvid V. Owaley " " " " "	17.70
Harry M. Werbitsky " " " " "	23.80
Jack Howard " " " " "	1.50
Arthur J. Snedeker " " " " "	1.50
Joe B. Dudley " " " " "	17.00
Helen F. Craig " " " " "	17.00
Horace W. Craig " " " " "	17.00
Rex M. Whitton " " " " "	23.80
Percy H. Daniells " " " " "	23.80
Printing Defendants' Evidence	494.98
Transcript of Evidence (Anna Feltenstein)	68.55
Attorneys' Fees	1000.00
Total	$1777.29

[fol. 85] Summary of Costs

I Costs Incurred by Public Service Commission	$1349.22
II Costs Incurred by State Highway Commission	1777.29
Grand Total	$3126.51

Wherefore, defendants Public Service Commission and State Highway Commission pray the Court to allow their costs, respectively, in said cause, in the above amounts.

Public Service Commission of the State of Missouri, By James H. Linton, General Counsel. Daniel C. Rogers, Assistant Counsel, Solicitors. State Highway Commission of Missouri, By Wilkie B. Cunningham.

In United States District Court

Statement of Appellees to Supplement Appellant's Statement of Evidence—Filed December 17, 1938

Appellees, and Appellant, Public Service Commission, realized prior to the decision of the Court on Appellees Bill in Equity, that the Counterclaim of Appellant, Public Service Commission, might never come before the Court for consideration. It was felt that, therefore, it would be unnecessary to consider it prior to the hearing of and rendition of opinion concerning the case presented in the Appellees Bill. Accordingly, it was agreed that Appellees might file a General Denial, to avoid being in default, with the understanding that if and when a situation arose making consideration of the Counterclaim necessary, Appellees should then have an opportunity to plead fully thereto. It was understood that Appellees thus did not waive their right to attack the Counterclaim for misjoinder, non-joinder, multifariousness, timeliness, lack of jurisdiction in the Statutory Three Judge Court, or otherwise.

[fol. 86] It was the intention and understanding of Appellees (in which they believe that the Appellant, Public Service Commission, concurred), that the Public Service Commission and other agencies of the State would take care of the enforcement of the provisions of the Act and of the Stipulation filed May 27, 1937, and would tend to

policing the Appellees' operations thereunder, inasmuch as Appellees had no facilities for doing so.

It was the intention and understanding of Appellees (in which they believed that the Appellant, Public Service Commission, concurred), that the Parties were not to interpret the Stipulation filed May 27, 1937, to include or deal with ten and twenty-mile zone operations; that the provisions of the Missouri Bus & Truck Act with reference to operations within the ten and twenty-mile zones, and with reference to the fees applicable to such operations, had not been enforced theretofore. It was the understanding of Appellees that Appellant did not seek or intend to enforce these provisions of the Act beyond the extent to which it had enforced them theretofore. It was the belief of Appellees that Appellant, Public Service Commission, concurred in this understanding.

Respectfully submitted, Kenneth Teasdale, B. W. LaTourette, Paul G. Koontz.

Approved: Jan. 7, 1939. J. C. Collett, District Judge.

Service of the above Statement is hereby acknowledged this 17 day of December, 1938.

James H. Linton, Daniel C. Rogers, Counsel for Appellant.

[fol. 87] IN UNITED STATES DISTRICT COURT

MANDATE OF SUPREME COURT OF UNITED STATES—Filed April 24, 1939

UNITED STATES OF AMERICA, ss:

The President of the United States of America,

To the Honorable the Judges of the District Court of the United States for the Western District of Missouri, Greetings:

Whereas, lately in the District Court of the United States for the Western District of Missouri, before you, or some of you, in a cause between Brashear Freight Lines, Inc., et al., Plaintiffs, and Public Service Commission of the State of Missouri, et al., Defendants, Equity No. 665, wherein the final decree of the said District Court (modified by order

of September 15, 1938) was duly entered in said cause on the 4th day of August, A. D. 1938; as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal sued out by Public Service Commission of the State of Missouri, et al., agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-eight, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was duly submitted:

On Consideration Whereof, It is now here ordered by this Court that the appeal herein be, and the same is hereby, dismissed for the want of jurisdiction.

February 13, 1939

You, therefore, are hereby commanded that such proceedings be had in such cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the twentieth day of April, in the [fol. 88] year of our Lord one thousand nine hundred and thirty-nine.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO COMMON CARRIER FEES RECEIVED BY ROY B. CHIPPS, TRUSTEE, FROM CERTAIN PLAINTIFFS, ETC.—Filed May 17, 1939

It is hereby stipulated and agreed between the parties that Roy B. Chipps, Trustee, whose duties as trustee are outlined in the temporary restraining order, as amended, has received from certain plaintiffs, and has held in trust, common carrier fees owing to the State of Missouri, under the provisions of Section 5272 of the Missouri Bus and

Truck Act and the rules of the Public Service Commission promulgated thereunder, in the total amount of One Hundred Four Thousand Fifteen Dollars and Forty-Three Cents ($104,015.43), itemized as follows:

		Emergency Fees	License Fees	Total
T-785	Adams Transfer & Storage Company	$ 2,532.00		$ 2,532.00
T-3712	Ben H. Barbour, d/b/a Barbour Transportation Company	6,366.96	65.00	6,431.96
T-4218	Be-Mac Transport Company, Inc.	6,913.50	1,470.00	8,383.50
T-84	Brashear Freight Lines, Inc.	1,253.00	2,100.00	3,353.00
T-4338	Commercial Freight Lines, Inc.	2,874.00		2,874.00
T-3406	Decatur Cartage Company		75.00	75.00
T-3743	Lawrence A. Elliott	1,139.00		1,139.00
T-4180	Galveston Truck Lines	900.00		900.00
T-2083	Gordons Transports, Inc.	4,885.00	2,450.00	7,335.00
T-2674	Highway Express, Inc.	2,585.00	275.00	2,860.00
T-3261	Highway Merchandise Carriers, Inc.	3,417.00		3,417.00
T-1751	Highway Motor Freight Lines, Inc.	3,283.56		3,283.56
T-2434	George Kimbel Truck Lines, Inc.	3,469.00	2,768.75	6,237.75
T-2643	M. K. & C. Truck Lines, Inc.	3,903.00		3,903.00
T-227	M-K Express Company	54.00		54.00
T-2842	Mound City Forwarding Company	97.50		97.50
T-1256	Plaza Express Company, Inc.	933.50	1,100.00	2,033.50
T-705	Potashnick Truck Service		825.00	825.00
[fol. 89]				
T-734	Powell Brothers Truck Lines, Inc.	10,802.00		10,802.00
T-3896	Riss & Company, Inc.	8,475.40	500.00	8,975.40
T-3804	Warren G. Shayler	498.48		498.48
T-2645	Southport Truck Lines	3,334.58		3,334.58
T-1539	Superior Forwarding Company, Inc.	358.75		358.75
T-3616	Transamerican Freight Lines, Inc.	2,504.90	1,000.00	3,504.90
T-1772	Viking Freight Company	326.00	5,706.25	6,032.25
T-2831	L. M. Voss, d/b/a Oklahoma Trucking Exchange	5,217.30	2,275.00	7,492.30
T-3642	Everett Wheelock and Fred G. Wheelock d/b/a Wheelock Brothers	5,682.90	1,600.00	7,282.00
	Total	$81,805.43	$22,210.00	$104,015.43

It is further stipulated and agreed that upon this 18th day of May, 1939, said amount of One Hundred Four Thousand Fifteen Dollars and Forty-Three Cents ($104,015.43) has been received by the Public Service Commission from said Roy B. Chipps and that his duties as trustee have been

faithfully performed and are now completed, and, upon the filing of this stipulation, his appointment is by the parties deemed terminated.

It is further stipulated that the Massachusetts Bonding and Insurance Company is hereby discharged of any obligation whatsoever incurred by it under the provisions of its bond securing and guaranteeing the payment of all moneys collected by Roy B. Chipps as trustee of certain funds paid to him in the above entitled cause.

It is further stipulated and agreed that Public Service Commission will promptly transmit to the Treasurer of the State of Missouri, the aforesaid amount of One Hundred Four Thousand Fifteen Dollars and Forty-Three Cents ($104,015.43), properly itemized and credited to the plaintiffs hereinbefore mentioned.

Kenneth Teasdale, B. W. LaTourette, Paul G. Koontz, Solicitors for Plaintiffs, James H. Linton, [fol. 90] General Counsel, Daniel C. Rogers, Assistant Counsel, Public Service Comm. of Missouri, Solicitors for Defendants. (Seal.)

Approved,

Massachusetts Bonding & Ins. Co., by J. G. Hedgcock, Attorney in Fact.

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS, PUBLIC SERVICE COMMISSION, ET AL., FOR DAMAGES—Filed May 22, 1939

Come now defendants, Public Service Commission of Missouri, State Highway Commission of Missouri, B. M. Casteel, Superintendent of the Missouri State Highway Patrol, and Hon. Roy McKittrick, Attorney-General of the State of Missouri, each in its or his own behalf, and each in behalf of the State of Missouri and of the State Treasurer of the State of Missouri, and file this motion, and herein move the Court to determine and assess damages and costs against each and every plaintiff in said cause, and against the Massachusetts Bonding and Insurance Company to the extent of its liability as surety on two injunction bonds herein filed.

Defendants state certain facts, for the basis of said motion, as follows:

(1) Plaintiffs by their bill in equity, filed on May 15, 1937, sought and obtained from this Court a temporary restraining order, which remained in full force and effect until August 4, 1938. Said order restrained the Public Service Commission and other defendants from requiring plaintiffs to pay to the Public Service Commission or any of defendants certain truck license fees for the use, repair and maintenance of the public highways of the State of Missouri, as provided by Section 5272 of the Missouri Bus and Truck Law, Laws of Missouri, 1931, pages 304-316, inclusive.

(2) According to said temporary restraining order, as modified by stipulation of parties dated May 27, 1937, all of [fol. 91] plaintiffs were required to pay over to one Roy B. Chipps, as trustee, the statutory license fees mentioned above, which fees plaintiffs, under the above mentioned statute, would have been obliged to pay to the Public Service Commission for delivery to the State Treasurer of the State of Missouri except for the effectiveness of the aforesaid temporary restraining order.

(3) Thirty (30) of the plaintiffs failed and refused throughout the entire period of time the temporary restraining order was in effect, namely, May 15, 1937 to August 4, 1938, to deposit any money for license fees with said trustee, and failed and refused for such period of time to procure licenses for the use of the public highways of Missouri and to pay the license fees required by the statute aforesaid.

(4) Forty-six (46) of the plaintiffs failed and refused throughout the entire period of time aforesaid to deposit with the trustee or pay to the Public Service Commission a certain portion of the license fees required by the statute aforesaid.

(5) Among the seventy-six (76) plaintiffs, against whom this motion is directed, are individuals, partnerships, companies and corporations, whose residences and principal places of business are in many different states. On account of their disregard and violation of the aforesaid Missouri Bus and Truck Law and of the temporary restraining order, the amounts of money which the plaintiffs respectively owe in license fees for the use, maintenance and repair of the

public highways of Missouri can be ascertained only by taking an accounting of their respective books and records. It would be extremely burdensome and injurious to their interests if defendants herein, who urge this motion in their own behalf and in behalf of the State of Missouri and of the State Treasurer of the State of Missouri, should be relegated to seventy-six (76) separate actions at law in many different states.

(6)-(a) Plaintiffs, as principals, and the Massachusetts Bonding and Insurance Company, as surety, under date of May 15, 1937 filed in this Court, according to law and the requirements of the Court, a certain injunction bond in the [fol. 92] amount of Ten Thousand ($10,000.00) Dollars, in which bond the principals and surety

"* * * are held and firmly bound unto Public Service Commission of the State of Missouri, Highway Commission of the State of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney General of the State of Missouri, * * *"

The condition of the aforesaid bond is

"Now, if the said Plaintiffs shall abide by the decision of said Court, and pay all moneys and costs which shall be adjudged against them, in case the said restraining order shall be dissolved, then these presents shall be void, otherwise to remain in full force."

(b) Plaintiffs, as principals, and the Massachusetts Bonding and Insurance Company, as surety, under date of September 8, 1937, filed in this Court, according to law and the requirements of the Court, another certain injunction bond in the amount of Twenty Thousand ($20,000.00) Dollars, in which bond the principals and surety

"* * * are held and firmly bound unto Public Service Commission of the State of Missouri, Highway Commission of the State of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney General of the State of Missouri, and State of Missouri, and State Treasurer of the State of Missouri, * * *"

The condition of the aforesaid bond is

"Now, if the said plaintiffs and the said interveners shall abide by the decision of said Court and pay all moneys and

costs which shall be adjudged against them in case the said restraining order shall be dissolved, then these presents shall be void, otherwise to remain in full force."

(7) The temporary restraining order, after final hearing on the merits, was dissolved by the decree of the Court entered and filed in this cause on August 4, 1938.

(8) By paragraph IV of said decree, as amended, defendants' counterclaim was also dismissed by the Court, without prejudice.

[fol. 93] (9) Plaintiffs did not prosecute an appeal from the portion of the decree of the Court dismissing their bill in equity and dissolving the temporary restraining order. Defendants prosecuted a direct appeal to the Supreme Court of the United States from paragraph IV of the decree of this Court dismissing the counterclaim, without prejudice.

(10) The mandate of the Supreme Court of the United States was filed in this Court on April 24, 1939, wherein said Supreme Court ordered that the defendants' aforesaid appeal

"* * * be, and the same is hereby, dismissed for the want of jurisdiction.

You, therefore, are hereby commanded that such proceedings be had in such cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

Wherefore, defendants, each in its or his own behalf, and each in behalf of the State of Missouri, and of the State Treasurer of the State of Missouri, pray the Court to set this motion for hearing and to take such further steps as may be required to ascertain and determine the amount of license fees for the use of the public highways of the State of Missouri which have accrued against plaintiffs and remain unpaid, and to assess said sum, and costs, as damages in favor of defendants, or the State of Missouri, or the State Treasurer of the State of Missouri, and against plaintiffs, and for judgment against plaintiffs for said amount, and for judgment against their surety, the Massachusetts Bonding and Insurance Company, up to the total amount of its liability under the two injunction bonds here-

inbefore mentioned, and for such other and further relief as may be reasonable and just.

James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel, Public Service Commission of the State of Missouri, Jefferson City, Mo., Solicitors for Defendants.

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION FOR DAMAGES—Filed July 5, 1939

It appearing to the Court that the subject matter and the relief prayed for in defendants' Motion for Damages, filed May 22, 1939, has heretofore been ruled and finally determined in this cause, the motion above referred to is hereby overruled.

Archibald K. Gardner, Circuit Judge; J. C. Collet, District Judge; Merrill E. Otis, District Judge.

Dated this 5th day of July, 1939.

IN UNITED STATES DISTRICT COURT

MOTION TO SET ASIDE ORDER OVERRULING AND TO RECONSIDER DEFENDANTS' MOTION FOR DAMAGES—Filed July 15, 1939

Come now defendants, Public Service Commission of the State of Missouri, State Highway Commission of Missouri, B. M. Casteel, Superintendent of Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney General of the State of Missouri, each in its or his own behalf, and each in behalf of the State of Missouri and of the State Treasurer of the State of Missouri, and file this motion, and herein move the Court to set aside its order, entered on the 5th day of July, 1939, overruling defendants' motion [fol. 95] for damages filed on May 22, 1939, and further move the Court to reconsider defendants' aforesaid motion for damages, and to set said motion for oral argument, for the following reasons:

(1) The Court erred in its decision that all of the subject matter and the relief prayed for in defendants' aforesaid motion for damages has been heretofore ruled and finally determined in this cause.

(2) The Court erred in its decision that numerous items of damages, other than the loss of statutory truck fees, have heretofore been ruled and finally determined by the Court.

(3) The Court erred in deciding that any items of damages other than those consisting of statutory truck fees have heretofore been submitted to the Court and ruled and determined by it.

(4) The Court committed error by deciding again that defendants' motion for damages, insofar as it pertained to loss by the State of Missouri of statutory truck fees during the period of time the temporary injunction was in effect, has heretofore been submitted, ruled and determined, because in reaching such decision the Court overlooked and failed to consider proper statutes, rules of the Public Service Commission, the various pleadings and papers filed of record in this cause, the invariable practice of the Commission, and the recognition of such practice by the attorney general and the state treasurer, tending to prove that the Public Service Commission is the proper party plaintiff to maintain an action to collect the statutory truck fees mentioned in Section 5272 of the Missouri Bus and Truck Law of 1931.

Wherefore, defendants pray the Court to set aside order overruling their motion for damages and to reconsider defendants' motion for damages, and thereupon to assess damage against plaintiffs (1) for money necessarily expended in preparing and prosecuting their respective defenses, and (2) for loss of large sums of money representing statutory fees which defendants were by the Court restrained from collecting on behalf of the State of Mis-
[fol. 96] souri during the 16-months period of time the temporary restraining order was in effect.

James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel Public Service Commission of the State of Missouri, Jefferson City, Missouri, Solicitors for Defendants.

SUGGESTIONS IN SUPPORT OF MOTION TO SET ASIDE ORDER OVERRULING AND TO RECONSIDER DEFENDANTS' MOTION FOR DAMAGES

In support of paragraphs (1), (2) and (3) of defendants' motion, the attention of the Court is called to the fact that paragraph IV of its judgment and decree, as amended, entered on or about the 15th day of September, 1938, considered only the question of whether or not the Public Service Commission or other defendants were proper parties to maintain by means of their counterclaim an action to collect from plaintiffs the statutory fees mentioned in Section 5272 of the Missouri Bus and Truck Act of 1931. Defendants' motion for damages, filed on May 22, 1939, is not limited to damages for loss of statutory fees. It is broad enough to include, and it was intended to include, such damages to which any of defendants are entitled by reason of the necessity of preparing and carrying out their respective defenses in this cause of action. Defendants were put to considerable expense in preparation and printing of a cost study and other data which were used in defending this suit. Moreover, in the preparation and presentation of said defense, the defendants necessarily expended very substantial amounts of money for travel by their respective attorneys and others who participated in the preparation and presentation of their respective defenses.

The foregoing and other proper items of damages were included, and were intended to be included, in defendants' motion for damages filed on May 22, 1939. Therefore, the Court has committed error in dismissing defendants' aforesaid motion without affording defendants an opportunity [fol. 97] to present for the consideration of the Court various items of damages, as heretofore suggested, which have no connection whatsoever with the subject matter of defendants' counterclaim which the Court heretofore in paragraph IV of its decree, as amended, ruled and determined.

In support of paragraph (4) of defendants' motion, it is urged that the Court has committed error by deciding that the loss by the State of Missouri of statutory truck fees during the time the injunction was in effect is not a proper subject of a motion for damages which the Public Service Commission, or any of the defendants, has power or authority by law to present for the consideration of and determination by this Court.

In the first place, plaintiffs by their bill in equity expressly recognized the power of the Public Service Commission to collect from them the aforesaid statutory truck fees. They declared such fees excessive and therefore unconstitutional. They asked the Court to restrain the Public Service Commission and other defendants from collecting those statutory fees from them.

Moreover, upon the filing of the counterclaim, by means of which the Court was asked to ascertain and determine the statutory truck fees due from plaintiffs and enter judgment against plaintiffs in favor of defendants for said statutory truck fees, the plaintiffs filed their answer. That answer was a general denial to the counterclaim. Such general denial was a recognition of the legal power and authority of the Public Service Commission to collect the statutory fees. If plaintiffs should have desired to contest the right of the Public Service Commission or other defendants to maintain an action for the collection of the statutory truck fees, it was their duty to have challenged the power and authority of the Public Service Commission in their aforesaid answer to the counterclaim. This they did not do. They acquiesced in the contention of the Public Service Commission, and other defendants, that the Public Service Commission is a proper party to maintain an action to collect the fees.

[fol. 98] Furthermore, the stipulation entered into between plaintiffs and defendants, which was by the Court incorporated into and made a part of the temporary restraining order, was an express recognition on the part of plaintiffs that the Public Service Commission was the proper party to maintain an action to collect the aforesaid statutory truck fees.

Again, recognition by plaintiffs of the right of the Public Service Commission to collect the statutory truck fees from them is expressly incorporated into a certain stipulation filed in this Court on or about May 22, 1939, whereby plaintiffs released and remitted to defendant Public Service Commission statutory fees in the amount of One Hundred Four Thousand Fifteen Dollars and Forty-Three Cents ($104,015.43), which fees had been impounded by plaintiffs under the express provisions of a certain stipulation wherein plaintiffs recognized the Public Service Commis-

sion as the proper party to collect the statutory fees from them. Such stipulation was by the Court incorporated into the temporary restraining order.

Finally, recognition by plaintiffs of the authority of the Public Service Commission to collect the statutory fees from them by civil action is evidenced by their application for a temporary restraining order, and by the order of the Court granting the temporary restraining order and requiring the plaintiffs to deposit injunction bonds in the aggregate amount of Thirty Thousand Dollars ($30,000.00). The injunction bonds in the aggregate amount of Thirty Thousand Dollars ($30,000.00) were furnished by plaintiffs and filed in this cause, with the recognition of the Court and all parties that such bonds were for no other purpose than to protect the Public Service Commission against the loss of statutory fees which it had the right to collect of plaintiffs, if such fees should be declared to be legal, on behalf of the State of Missouri.

It is urged, therefore, that the Court has completely overlooked all of the aforesaid pleadings and papers in this case, which clearly indicate a recognition on the part of the Court as well as on the part of the parties that the Public Service Commission is the proper party to assert itself by [fol. 99] legal action, if necessary, for the collection of the statutory fees in question. Upon consideration of these papers of record, alone, the Court should take jurisdiction of defendants' motion for damages.

By supplementary answer defendants pleaded and submitted to the attention of the Court the entire Missouri Bus and Truck Act of 1931, together with all Rules and Regulations of the Public Service Commission of Missouri promulgated thereunder.

Commission Rules Nos. 14-B, 15-B and 16-B clearly indicate that travel orders must be purchased from the Commission and the money therefor remitted to the Commission. The evidence and pleadings in the case abundantly show that the far greater amount of money paid by plaintiffs for the use of the public highways was accustomed to be paid to the Public Service Commission as travel order fees. It is also the contention of the Commission that the law and Rules indicate a legislative intent that the Commission shall collect annual license fees from motor carriers.

Indeed, Section 5267-(a) provides:

"The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license, supervise, and regulate every motor carrier in this state * * *"

Imposition upon the Commission of the duty to license necessarily implies the duty to collect the license fee. The Court should have no difficulty in deciding that the administrative agency committed with the duty of issuing annual and temporary licenses was intended by the Legislature also to be the state agency for collection of the license fees. Any other interpretation of the statute convicts the Legislature of blundering. The Court will credit the Legislature with having intended to enact a practical, workable law.

Moreover, Section 5267-(b) provides as follows:

"The Public Service Commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined * * *"

[fol. 100] Section 5268, among other things, provides:

"In the event of the establishment of any port or ports of entry or exit the expense of the establishment and maintenance of each such port shall be paid out of the receipts at each port derived from the sale of temporary permits to interstate carriers * * *"

The Public Service Commission is authorized to establish such ports of entry and administer the law at such ports. There is no provision in the law for the State Treasurer to collect the fees at ports of entry or elsewhere.

The foregoing rules and sections of the statute clearly show a legislative intent to vest in the Public Service Commission authority to maintain suits at law or in equity for the purpose of collecting on behalf of the State of Missouri the statutory fees mentioned in Section 5272.

When the Court dismissed the counterclaim by means of paragraph IV of its decree, it did so without having given defendants an opportunity to be heard on the question of the counterclaim. They had no opportunity to present evidence by witnesses or otherwise to show that the Public Service Commission has always collected fees

from motor operators under the Missouri Bus and Truck Law. They had no opportunity to present evidence that the attorney general and the state treasurer have always manifested consent that the Commission is empowered to collect those fees. The Court should now set aside its order so that it may receive new and additional evidence on the subject that the Commission and other state officers of Missouri have always construed the Missouri Bus and Truck Law as empowering the Commission to collect the fees, and by suit if necessary.

In conclusion, it is urged that the three-judge court in this district, in the case of Frank Eichholz vs. Public Service Commission, et al., In Equity No. 660, 23 Fed. Supp. 587, upheld the power and authority of the Public Service Commission to maintain a civil action for collection of the statutory fees in Section 5272 of the Missouri Bus and Truck Act. Plaintiffs in that case appealed to the Supreme Court of the United States from the decree of the district court dismissing their injunction and taking jurisdiction of the counterclaim. The Supreme Court of the United [fol. 101] States affirmed the decree of the district court insofar as it pertained to the dissolution of the temporary injunction. If the Public Service Commission should, as a matter of law, be wholly without jurisdiction to maintain a civil action to collect the fees mentioned in Section 5272, it would have been the duty of the Supreme Court of the United States, on having the jurisdiction of the Public Service Commission expressly challenged, to do justice in behalf of appellants in that case by a decision directing the district court to dismiss the counterclaim for want of jurisdiction.

Respectfully submitted, James H. Linton, General Counsel. Daniel C. Rogers, Assistant Counsel, Public Service Commission of the State of Missouri, Solicitors for Defendants.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO SET ASIDE ORDER OVERRULING DEFENDANTS' MOTION FOR DAMAGES—Filed July 25, 1939

The motion of the defendants Public Service Commission of the State of Missouri, et al., to set aside the order of

this Court overruling defendants' motion for damages, is hereby overruled.

Archibald K. Gardner, Circuit Judge. J. C. Collet, District Judge. Merrill E. Otis, District Judge.

Dated at Kansas City, Missouri, this 24th day of July, 1939.

[fol. 102] RULES OF DEFENDANT PUBLIC SERVICE COMMISSION

(a).—Rule No. 7. Application for Temporary Permits by Interstate Carriers.—Each application for a temporary permit by interstate carriers for the transportation of passengers or property must be in writing and on blanks made available by the Commission; applicant must file with the original application two copies thereof; and the application must contain or be accompanied by:

(a) A statement showing the principal office or place of business and residence of the applicant, and a statement giving full and detailed information concerning the ownership and physical condition of the property used or to be used by the applicant.

(b) A recital showing whether the applicant is a person, firm, partnership, association, joint stock company, corporation, lessee, trustee or receiver appointed by any court whatsoever.

(c) A statement showing point of origin and point of destination of the passenger or commodity to be transported.

(d) A written document designating the Secretary of the Public Service Commission as the authorized agent upon whom legal service may be had in all actions arising in this state from any operation of motor vehicles under authority of such temporary permits.

(e) Each application for a temporary permit by an interstate carrier must be filed in the office of the Secretary of the Public Service Commission or at any duly authorized port of entry established by the Commission.

(b)—Rule No. 8. Fees for Temporary Permits of Interstate Carriers.—Each interstate carrier operating under authority granted by an interstate permit as provided by

Section 5268 of the Missouri Bus and Truck Law of Missouri, either for the transportation of persons or property shall pay the fees in advance for said temporary permit as hereinafter set out:

[fol. 103] For each motor vehicle operating under a temporary interstate permit as a freight-carrying vehicle the fees for the temporary permit shall be determined by actual load carrying capacity of said vehicle, as follows:

More than 1½ tons and not more than 4 tons	$2.00
More than 4 tons and not more than 7 tons	4.00
More than 7 tons and not more than 9 tons	7.00
More than 9 tons	9.00

For each motor vehicle operating under temporary interstate permits as a passenger-carrying vehicle of passengers for hire the fees for the temporary interstate permits shall be as follows:

Any bus of a carrying capacity of 7 passengers or less	$2.00
Any bus of a carrying capacity of more than 7 passengers and less than 18 passengers	3.00
All busses of a carrying capacity of 18 passengers or more	4.00

(c)—Rule No. 13. Ports of Entry.—Temporary interstate permits may be issued at the ports of entry which have been duly and legally designated by the Commission. The holder of such interstate permit card may enter this state through the port of entry after securing said temporary interstate permit from the keeper of said port of entry. If a temporary interstate permit card has been acquired from the Bus and Truck Department of the Public Service Commission at Jefferson City, the holder of said temporary interstate permit card may enter this state by displaying the same to the keeper of the Port of Entry provided the temporary interstate permit card that is presented to the keeper of the Port of Entry is a valid temporary interstate permit card and has not been used by the person, partnership, firm, association, trustee, lessee or receiver to whom the same was issued.

(d)—Rule No. 14-B. Emergency Vehicle, How May Be Used. In case of emergency or unusual demand for transportation other motor vehicles or trailers may be used by

an operator under his certificate or permit for a limited [fol. 104] period; Provided, that each case of such use of emergency or extra equipment shall be reported to the Commission on date of issue on emergency travel order form furnished by the Commission. All emergency equipment used under travel orders must be either owned or leased by the operator and operated by him, or his servant or servants. The Commission will issue such extra travel order forms in triplicate to any certificated operator in books of 5, 10, or 25, or at the request of the operator one such travel order may be purchased. One of the triplicate copies of this form must be in the possession of the driver of the vehicles when so used. Each order shall be good for one day as herein defined and no longer. If the vehicle is to be used for more than one day, separate travel orders must be issued by the operator for each day's operation. A day as defined by the Commission for freight-carrying vehicles is from 6 P. M. to 6 P. M. the following calendar day or from 12:01 A. M. to 12:01 A. M. the following day. For passenger-carrying vehicles the day is defined from 12:01 A. M. to 12:01 A. M. the following day. On the day that the emergency travel order is used by any certificated carrier or employee it is mandatory that the carrier issuing such travel order punch the day, month and year on the margin of the travel order to indicate the day the use of the travel order is to begin. The operator will be required to purchase and pay in advance for such extra travel order or orders at the time of issue by the Commission. The fee to be paid for said emergency travel order or orders shall be as follows:

For vehicles of more than 1½-ton actual load capacity to and including 4 tons actual load capacity each travel order $1.50 per day or part thereof when used as extra or emergency equipment; vehicles of more than 4 tons actual load capacity to and including 7 tons actual load capacity $2.00 per day or part thereof when used as extra or emergency equipment; vehicles of more than 7 tons actual load capacity to and including 9 tons $3.00 per day or part thereof when used as extra or emergency equipment; vehicles of more than 9 tons actual load capacity $4.50 per day or part thereof when used as extra or emergency equipment.

[fol. 105] In respect to passenger-carrying vehicles fees for the use of emergency equipment will be based on the

following schedule per day or any part thereof. Vehicles of 7 or less passenger capacity $1.00 per day or fraction thereof when used as extra or emergency equipment; vehicles of more than 7-passenger capacity and less than 18-passenger capacity $1.50 per day or fraction thereof when used as extra or emergency equipment; vehicles of more than 18-passenger capacity $2.00 per day or fraction thereof when used as extra or emergency equipment.

(e)—Rule No. 15-B. Issuance and Use of Travel Orders.—The Commission will have on hand for the purchase by the operator desiring travel order blank books containing 5, 10, and 25 emergency travel orders. Such travel order books shall be furnished in such form that each travel order blank will be issued in triplicate. Upon the use of each travel order the operator shall fill in or punch, as the case may be, the required date designating the certificate or permit number, the number of the tractor or trailer, name of driver, owner of vehicles, the name of the carrier, and the date the use of the travel order is to begin. The triplicate original of such travel order shall be immediately filed with the Commission. One triplicate copy to be carried by the driver of the vehicles and the third triplicate copy to be retained by the operator as stated in Rule 14-B. Any operator may purchase one travel order upon the payment of the required fee as set out in that rule.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF TRANSCRIPT—Filed October 20, 1939

Now come the parties and stipulate, in accordance with Rule No. 75-(f) of the Rules of Civil Procedure, that the record on appeal may consist of copies of the following pleadings, documents and papers, with deletions and omissions therefrom of all irrelevant and formal portions, which have been made by counsel for the parties:

1. Bill In Equity, filed May 15, 1937.

2. (Temporary) Restraining Order and Order to Appear For Hearing, filed May 15, 1937.

[fol. 106] 3. Bond, in the amount of Ten Thousand ($10,000.00) Dollars, filed May 15, 1937.

4. Stipulation Of Parties, (adopted by the Court as a modification of Temporary Restraining Order), filed May 27, 1937.

5. Petition For Leave To Intervene, filed May 27, 1937.

6. Order Allowing Petitioners To Intervene, filed May 27, 1937.

7. Bond, in the amount of Twenty Thousand ($20,000.00) Dollars, filed September 8, 1937.

8. Defendants' Joint Answer, including Counterclaim of defendant Public Service Commission, filed September 17, 1937.

9. General Denial, filed against Counterclaim, September 22, 1937.

10. Defendants' Supplementary Answer, filed January 31, 1938.

11. Opinion, handed down June 15, 1938.

12. Findings Of Fact And Conclusions Of Law, filed July 2, 1938.

13. Amended Answer And Counterclaim, with Suggestions, lodged with Clerk on July 26, 1938.

14. Decree of Court, filed on August 4, 1938.

15. Petition For Rehearing And Motion To Modify The Decree, with Suggestions, filed September 3, 1938.

16. Order Modifying Decree And Overruling Petition For Rehearing, filed September 16, 1938.

17. Statement Of The Evidence, filed November 28, 1938.

18. Defendants' Motion For Costs, filed December 15, 1938.

19. Statement Of Appellees To Supplement Appellant's Statement Of Evidence, filed December 17, 1938.

[fol. 107] 20. Mandate of Supreme Court of the United States, filed April 24, 1939.

21. Stipulation, filed May 17, 1939.

22. Motion For Damages, filed May 22, 1939.

23. Order Overruling Motion For Damages, filed July 5, 1939.

24. Motion To Set Aside Order Overruling And To Reconsider Defendants' Motion For Damages, filed July 15, 1939.

25. Order Overruling Motion To Set Aside Order Overruling Defendants' Motion For Damages, filed July 25, 1939.

26. Notice Of Appeal, filed October 3, 1939.

27. Rules Of Defendant Public Service Commission:

(a) Rule 7—Application for Temporary Permits by Interstate Carriers.

(b) Rule 8—Fees for Temporary Permits of Interstate Carriers.

(c) Rule 13—Ports of Entry.

(d) Rule 14-B—Emergency Vehicle, How May Be Used.

(e) Rule 15-B—Issuance and Use of Travel Orders.

Dated this 19th day of October, 1939.

James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel, Missouri Public Service Commission, Counsel for Defendants; Kenneth Teasdale, B. W. LaTourette, Paul G. Koontz, Counsel for Plaintiffs.

[fol. 108] In United States District Court

Point Upon Which Appellants Intend to Rely—Filed October 20, 1939

Defendants intend to rely upon the following points:

1. The Court abused its discretion in overruling defendants' motion for damages filed on May 22, 1939:

(a) It threw defendants out of Court without giving them an opportunity to present evidence of numerous items

of expenses and damages incurred whilst defending against the improvidently issued restraining order.

(b) It deprived defendant state officers of their right to recover in damages, on behalf of the State of Missouri, the statutory license fees which plaintiffs would have been compelled to pay except for the effectiveness of the restraining order.

(c) The Court was duty bound to render equity to the defendants on matters of damages incurred by them as a direct result of the restraining order.

(d) By modifications of the temporary restraining order on May 27, 1937, the Court recognized and sanctioned the right of defendants to recover from plaintiffs the statutory fees in question.

2. The Court erred in overruling the aforesaid motion for damages on the grounds that none of the defendants, especially defendant Public Service Commission, are proper parties to maintain an action in damages against plaintiffs for failure and refusal to deposit all of the statutory license fees with the Trustee, as they were obligated to do under the terms of the Stipulation of parties which was by the Court incorporated into its temporary restraining order.

3. The Court erred in overruling the aforesaid motion and relegating defendants to seventy-six separate actions at law in many different States to recover statutory fees for the use of the public highways, which fees the Court itself ordered plaintiffs to deposit with the Trustee named [fol. 109] in the Stipulation of parties, and which fees plaintiffs failed and refused to deposit with said Trustee.

James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel, Missouri Public Service Commission, Counsel for Defendants.

Received a copy hereof this 19th day of October, 1939.
Kenneth Teasdale, Atty. for Plaintiffs.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 110-111] Appearances of counsel omitted in printing.

[fol. 112] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

NOTICE OF FILING OF MOTION OF APPELLEES TO DISMISS APPEAL —Filed May 11, 1940

To the Appellants herein and their counsel of record:

Please take notice that the undersigned on behalf of appellees have filed a motion to dismiss the appeal taken in this cause, a copy of which is attached to this notice, and that on the 14th day of May, 1940, at which time the case is set for argument, or as soon thereafter as counsel can be heard, we shall submit the same to the Honorable Circuit Court of Appeals for the Eighth Circuit, at St. Paul, Minnesota, for decision.

Kenneth Teasdale, B. W. LaTourette, P. G. Koontz, Solicitors for Appellees.

Service of a copy of the within notice acknowledged this 9 day of May, 1940.

James H. Linton, Daniel C. Rogers, Solicitors for Appellants.

[File endorsement omitted.]

[fol. 113] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11,618. Civil

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI et al., Appellants,

v.

BRASHEAR FREIGHT LINES, INC., et al., Appellees

Appeal from the District Court of the United States for the Western District of Missouri

MOTION OF APPELLEES TO DISMISS THE APPEAL—Filed May 10, 1940

Now come appellees and move the Court to dismiss the appeal filed herein and for cause show:

(1) that it appears said appeal was not sued out within three months of the entry of final judgment in the cause;

(2) that the appeal is from an order entered in the second term subsequent to the judgment term;

(3) because the appeal is from a so-called motion for damages which itself was filed during the second term subsequent to the judgment term;

[fol. 114] (4) because the appeal is from an order overruling, in effect, a motion for new trial or petition for rehearing, which motion for new trial or petition for rehearing was filed after the term at which judgment was entered;

(5) because the appeal is from an order overruling, in effect, a motion for new trial, one motion for new trial having theretofore been filed, submitted and overruled;

(6) because the appeal is from a motion purportedly for damages, but, in effect, a counterclaim, which counterclaim as to part of the appellees had been previously dismissed by the Court, and as to part of appellees constituted the assertion of an original counterclaim after hearing and final decree;

(7) because the appeal is from an order overruling a purported motion for damages, which motion does not seek the ascertainment of the extent of damages awarded by the decree of the three-judge court, but of damages disallowed by the three-judge court.

Respectfully submitted, Kenneth Teasdale, B. W. LaTourette, Paul G. Koontz, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 115] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION—May 25, 1940

This cause being this day reached on the calendar the same is at the request of counsel for the respective parties, submitted to the Court without oral argument on the transcript of the record from said District Court, the motion of appellees to dismiss appeal and on the briefs of counsel filed herein.

[fol. 116] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 11,618. May Term, A. D. 1940

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, et al.,
Appellants,

vs.

BRASHEAR FREIGHT LINES, INC., et al., Appellees

Appeal from the District Court of the United States for the Western District of Missouri

Mr. James H. Linton, General Counsel, and Mr. Daniel C. Rogers, Assistant Counsel, Public Service Commission of the State of Missouri, submitted brief for appellants.

Mr. Kenneth Teasdale, Mr. B. W. LaTourette, and Mr. Paul G. Koontz submitted brief for appellees.

Before Woodrough and Thomas, Circuit Judges, and Bell, District Judge

OPINION—August 26, 1940

[fol. 117] WOODROUGH, Circuit Judge, delivered the opinion of the court:

The Public Service Commission of Missouri and certain State officers appeal from an order of a three-judge court overruling their motion for damages claimed to have been sustained as the result of the improvident issuance of a restraining order, later dissolved by the court. The suit was brought by the Brashear Freight Lines, Inc., and other trucking concerns, against the Commission and the State officers to enjoin the enforcement of the trucking taxes imposed under the Missouri Act of May 6, 1931 (Sections 5264-5280 Art. VIII C. 33) on the ground of unconstitutionality, and tax payments were suspended by virtue of the restraining order pending final determination of the suit for injunction.

The defendants denied that the taxes were unconstitutional and prayed the court by way of counter-claim to enforce the collection of the accruing taxes. The trial court of three judges held the Act valid, denied injunction, dis-

solved the restraining order and dismissed the petition. It declined to try the counter-claim and dismissed the same without prejudice. The defendants in the suit appealed directly to the Supreme Court from the order dismissing their counter-claim, but the Supreme Court held that it had no jurisdiction of a direct appeal on that issue and remanded the case (apparently to the three-judge court). Public Service Commission v. Brashear, 306 U. S. 204. Thereupon the defendants in the suit presented to the court of three judges their motion "to determine and assess damages and costs" against each and every plaintiff in the cause and their respective bondsmen. The motion was limited by its terms to the fees and taxes claimed to have accrued against the numerous truckers between the issuance of the restraining order and the date of the motion, i. e., during the period from May 15, 1937, to May 22, 1939. [fol. 118] The court overruled the motion and the defendants appeal.

It appears that the Brashear Freight Lines, Inc., and some forty other corporations engaged in the business of automobile truck transportation were subject under the terms of the 1931 Motor Bus and Truck Laws of Missouri to certain license fees charged by the State for use of its highways, such fees being charged on a schedule which graduated the amount of the fee with regard to the weight-carrying capacity of the truck to be licensed. The Act also prescribed fees of 50% of the maximum for short twenty mile runs into the State, and 33⅓% for ten mile runs. The short run licensing provisions were difficult to enforce and were largely left unenforced. The truck companies on May 15, 1937, found themselves threatened with enforcement of the licensing provisions by criminal prosecution, penalties and forfeitures, and deeming the law unconstitutional they brought this action in the U. S. District Court for a preliminary and final injunction against the Public Service Commission, the Superintendent of Highway Patrol and the Attorney General, State officers charged with the duty of enforcing collection of the fees. The verified bill prayed for a restraining order against enforcement of the law, and since a prima facie right thereto was shown, the District Court granted the restraining order upon deposit of a bond in the amount of $10,000.00. The parties entered into a stipulation whereby the truck companies bound themselves to make reports of truck entries into the state, and

to pay the amount of license fees to a trustee; the Public Service Commission did not bind itself or the State of Missouri to be responsible for collection of any checks or money orders paid to the trustee and did not waive any rights to collect any amount found due to the State upon determination of the cause. On the day this stipulation was filed, May 27, 1937, some thirty other trucking concerns, to-wit, [fol. 119] corporations, partnerships and individuals,—petitioned for intervention in the action and were permitted to intervene upon filing a bond in the amount of $20,000.00 which incorporated the stipulation entered into by the original parties to the suit. The counter-claim filed by defendants contained allegations that "certain of" the plaintiff truck concerns had not paid all the fees owing under the Act through the six years of its operation, that it was difficult for defendants to serve most of the plaintiffs with process since they were not resident in Missouri, and that defendants did not have knowledge of the number of vehicles for which fees had not been paid, nor their carrying capacity. It was also alleged that

"'The amounts due and payable in license fees as aforesaid are not unliquidated, but are liquidated, definite and certain sums which could be accurately determined upon a proper accounting. Although such account could be accurately stated, if the facts were at hand, the taking of said account would be long and complicated."

Defendants prayed for equitable relief of accounting to determine the amount of the fees and enforcement of payment against the numerous plaintiffs.(1) The truck concerns filed a general denial, which they say was merely a temporary pleading to avoid default and was filed with the understanding that they might later attack the propriety of the counter-claim and defendants' right to present it in the action. This was controverted.

At the trial of the merits of the case before the three-judge court, consideration of the counter-claim was deferred for hearing subsequent to trial of the injunction issue. When hearing on that issue was completed, however, the

---

(1) This court has held that tax collection suits are not within equity jurisdiction as actions for accounting. City of Sedalia v. Standard Oil Co. of Indiana, 66 F. 2d 757, 761.

counter-claim was not presented or tried, and the court, in [fol. 120] the entry of its decree, included the following ruling upon the defendants' counter-claim:

"That the issue raised by the defendants' counter-claim, not having been urged nor presented by the parties, and the court being in doubt as to the right of the defendants to maintain such counter-claim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them, shall be so advised."

Upon motion of defendants the court modified the decree by striking from this sentence of the decree the words "not having been urged nor presented by the parties", so that only dismissal of the counter-claim without prejudice was effected. The motion for damages was filed after the mandate of the Supreme Court had come down; the motion recited the restraining order, the stipulation of the parties, the deposit of the restraining order bonds and alleged failure of compliance on the part of the truckers. The motion contained a prayer that the court take such steps as might be required to ascertain and determine the amount of license fees accrued and unpaid and to assess said sum and costs as damages in favor of the defendants or the State of Missouri or the State Treasurer and for judgment for the amounts against the plaintiffs and against their bondsmen to the extent of the bonds. On the hearing of the motion, July 5, 1939, the court indicated that it had passed upon the controlling question in its decree entered August 4, 1938. The motion was accordingly denied.

Whether a court which issues, and then on hearing dissolves, a restraining order, will entertain a motion to assess damages at the instance of the defendant in proceedings ancillary to the main action, or whether such court will remit the petitioner to his separate action by dismissing without prejudice, is in this circuit a matter within the dis- [fol. 121] cretion of the court. In United Motors Service, Inc. v. Tropic-Aire, Inc., 57 F. 2d 479, this court made exhaustive review of the authorities and announced its conclusion that dismissal without prejudice of a motion to assess damages in such a situation would be set aside only when the discretion of the court was abused—that the

discretion is not questioned for wisdom, but only for abuse. We think the decision controlling against the appellant here. The contention is made that the dismissal without prejudice was not entered in the exercise of the court's discretion, but we think it clear from the record that such contention is without merit. It is true the trial court commented that it entertained a doubt whether the necessary parties to a litigation of the damages were before the court, but it did not find or declare a defect of parties. It merely decided within its discretion that it would not entertain the ancillary litigation.

We think that the court of three judges properly limited itself to the function for which it was specially constituted and rightly declined to enter upon the trial and adjudication of an ancillary litigation involving on the petitioners' own showing a "long and complicated" inquiry. 'The nature of the special tribunal justifies its questioning critically concerning the character of any case of which it is called upon to take jurisdiction, and it should refuse to enter upon the trial of matters of which it is not required to take cognizance. As said by the Supreme Court in Oklahoma Gas Co. v. Packing Company, 292 U. S. 386-391, "The three judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended. *Ex parte Collins*, 277 U. S. 565-569."

The restraining order in this case was issued and the conditions and terms of the security for damages were [fol. 122] fixed by the District Judge in the Western District of Missouri. His action in the matter of imposing conditions and exacting security from the plaintiffs and interveners was effective to the extent that more than a hundred thousand dollars of fees and taxes were obtained by the State without litigation. The defendants' only claim was that the action taken by the judge had not been completely effective. The three-judge court had had nothing to do with the matter of prescribing the conditions of the restraining order. It fully performed its special function of adjudicating upon the constitutionality of the questioned Act. The defendants' mistaken assumption that their incidental claim presented a controversy directly reviewable in the Supreme Court doubtless led them to press it for determination by the three-judge court. See and compare,

Eichholz v. P. S. Commission, 306 U. S. 268. We think the proper procedure in such a situation as here presented requires that the three-judge court which has discharged its essential function of adjudicating upon constitutionality, should, upon presentation of the facts by the parties, remit any such ancillary litigation to the District Judge for proceedings "to be taken independently of Sec. 266 of the Judicial Code." Such procedure seems to be indicated by the cases.(2) But we do not decide that the three-judge court was without jurisdiction to enter its decree and order dismissing the proposed ancillary litigation. It had such discretion and there was no abuse.

Affirmed.

DISSENTING OPINION

BELL, District Judge, dissenting.

A three-judge court was assembled in this case to determine the constitutionality of the state statute that was involved and not for any other purpose. When it performed [fol. 123] that function it should have referred all other issues in the case to the proper Judge of the District Court of the United States for the Western District of Missouri for appropriate proceedings, and such action would have been in accordance with the rule announced by the court, as follows: "We think the proper procedure in such a situation as here presented requires that the three-judge court which has discharged its essential function of adjudicating upon constitutionality, should, upon presentation of the facts by the parties, remit such ancillary litigation to the District Judge for proceedings to be taken independently of Section 266 of the Judicial Code." I fully approve of this rule and think it should be followed in this case.

The court has cited United Motors Service, Inc. v. Tropic-Aire, Inc., 57 F. 2d 479, as authority for the principle that

---

(2) Massachusetts v. Missouri, 60 S. Ct. loc. cit. 43, 308 U. S. loc. cit. 19; see Rorick v. Commissioners, 307 U. S. 208, 213; Wm. Jameson & Co. v. Morgenthau, 307 U. S. 171, 174; Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co., 292 U. S. 386, 392; Cf. Wilentz v. Sovereign Camp, W. O. W., 306 U. S. 573, 582. Ex parte Bransford, 60 S. Ct. 947, 951.

dismissal of the issue presented by the counter-claim was within the jurisdiction of the court. That was a patent case where a District Judge was sustained in holding that, in dissolving a temporary injunction against patent infringement, the court had discretion to retain the case and determine damages under the injunction bond in an ancillary proceeding or leave the parties to an action at law. The principle there announced has no applicability to the jurisdiction of a three-judge court.

In my opinion, the three-judge court in this case was without jurisdiction to dismiss defendant's counter-claim.

[fol. 124] In United States Circuit Court of Appeals, Eighth Circuit. May Term; 1940

No. 11618

Public Service Commission of the State of Missouri; State Highway Commission of Missouri; B. M. Casteel, Superintendent of the Missouri State Highway Patrol; and Honorable Roy McKittrick, Attorney General of the State of Missouri, Appellants,

vs.

Brashear Freight Lines, Inc., et al.

Appeal from the District Court of the United States for the Western District of Missouri

Decree—August 26, 1940

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court appealed from, in this cause be, and the same is hereby, affirmed with costs; and that the Brashear Freight Lines, Inc., et al., have and recover against the Public Service Commission of the State of Missouri; State Highway Commission of Missouri; B. M. Casteel, Superintendent of the Missouri State Highway Patrol; and Honorable Roy McKittrick, Attorney General of the State

of Missouri, the sum of Twenty Dollars for their costs herein and have execution therefor.

[fols. 125-137] Petition for rehearing covering 13 pages filed Sept. 10, 1940, omitted from this print. It was denied, and nothing more by order of Sept. 18, 1940.

[fol. 138] In United States Circuit Court of Appeals

Order Denying Petition of Appellants for Rehearing—September 18, 1940

The petition for rehearing filed by counsel for the appellants having been considered, It is now here Ordered by this Court that the same, be, and it is hereby, denied.

[fol. 139] In United States Circuit Court of Appeals

Motion of Appellants to Stay Mandate—Filed September 26, 1940

Now come appellants and move the Court to stay its mandate in this cause for a period of thirty days from September 30, 1940, pending application to be made within the period of said stay to the Supreme Court for writ of certiorari.

James H. Linton, Daniel C. Rogers, Covell R. Hewitt, Edgar H. Wayman, Harold C. Hanke, Louis V. Stigall, Wilkie B. Cunnyngham, Attorneys for Appellants.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—October 4, 1940

On Consideration of the motion of appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of

the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 140] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 141] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 16, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 44,898. U. S. Circuit Court of Appeals, Eighth Circuit, Term No. 549. Public Service Commission of the State of Missouri, et al., Petitioners, vs. Brashear Freight Lines, Inc., et al. Petition for a writ of certiorari and exhibit thereto. Filed November 4, 1940. Term No. 549. O. T. 1940.

Office - Supreme Court, U. S.
FILED
NOV 4 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

NO. 549

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, et al., *Petitioners*,

vs.

BRASHEAR FREIGHT LINES, INC., et al., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Attorneys for Petitioners:

JAMES H. LINTON,
DANIEL C. ROGERS,
COVELL R. HEWITT,
LOUIS V. STIGALL,
WILKIE B. CUNNYNGHAM,
Jefferson City, Missouri.

EDGAR H. WAYMAN,
HAROLD C. HANKE,
St. Louis, Missouri.

BLANK PAGE

INDEX

	Page
PETITION FOR WRIT OF CERTIORARI	1
I. Summary and Short Statement of Matter Involved	1
Summary	1
Short Statement	2
II. Jurisdictional Statement	6
III. The Questions Presented	7
IV. Reasons Relied on for the Allowance of the Writ	8
SUPPORTING BRIEF AND ARGUMENT	12
Citation of Opinion of the Court Below	12
Statement	12
Specification of Reasons for Allowance of Writ	12
Argument	12

CASES CITED:

Brashear Freight Lines, Inc., et al. v. Pub. Serv. Comm., et al., 23 Fed. Supp. 865	7
Camp v. Boyd, 229 U. S. 530, l. c. 551, 552	15
Chicago v. Northwestern Ry. Co. v. Lindell, 281 U. S. 14, 17, 74 L. Ed. 670, 672	16
Eichholz v. Hargus, et al., 23 Fed. Supp. 587	9, 12
Inland Steel Company v. United States, 306 U. S. 153, 83 L. Ed. 557, 560	13
William Jameson & Co. v. Morgenthau, 307 U. S. 171, 83 L. Ed. 1189	18
Leman v. Krentler-Arnold Hinge Last Co., 284 U. S. 448, 451, 76 L. Ed. 389, 393	16
Oklahoma Gas Co. v. Oklahoma Packing Co., 292 U. S. 386, 78 L. Ed. 1318	18
Owl Creek Coal Co. v. Big Horn Collieries, 36 F. (2d) 485	14
Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273, l. c. 279	15
Pub. Serv. Comm. v. Brashear Freight Lines, Inc., et al., 306 U. S. 204, 83 L. Ed. 608	3, 12, 17
Railroad Commission of California v. Pacific Gas & Electric Co., 302 U. S. 388, 391, 82 L. Ed. 319, 321	16
Rorick v. Board of Commrs. of Everglades Drainage District, 307 U. S. 208, 83 L. Ed. 1242	18
Russell v. Farley, 105 U. S. 433, 445	12
Siler vs. L. & N., 213 U. S. 175, 53 L. Ed. 753	16
Sovereign Camp, W. O. W. v. Murphy, 17 Fed. Supp. 651	16
Sterling v. Constantin, 287 U. S. 378, 393, 394, 77 L. Ed. 375, 383	16
United Motors Service v. Tropic-Aire, 57 F. (2d) 479	6, 13
Wilentz v. Sovereign Camp, W. O. W., 306 U. S. 573, 83 L. Ed. 994	18
Young Co. v. McNeal Edwards Co., 283 U. S. 398, 400, 75 L. Ed. 1140-1141-1142	16

STATUTES CITED:

Section 240, Amended, Judicial Code (28 USCA 347)	6
Section 266, Judicial Code (28 USCA 380)	1
Section 5272, Missouri Bus and Truck Law, Laws of Missouri, 1931, pp. 304-316, inclusive	2, 7, 10, 12

BLANK PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

NO.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, et al., *Petitioners,*

vs.

BRASHEAR FREIGHT LINES, INC., et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evan Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary and Short Statement of Matter Involved.

Summary. In an injunction proceeding, arising under the provisions of Section 266 of the Judicial Code, a three-judge district court, Western District of Missouri, overruled defendants' Motion For Damages (R. 90) against seventy-six (76) common carrier truck operators, plaintiffs, and the surety on their injunction bonds. The Eighth Circuit Court of Appeals affirmed the order, with one judge dissenting.

The opinion (R. 113) sought to be reviewed holds that, although the Motion For Damages **should have been** referred back to the single judge who granted the temporary restraining order, to be tried independently of Section 266 of the

Judicial Code, the three-judge court, nevertheless, did not abuse its discretion in dismissing the proposed anciliary litigation. The dissenting opinion (R. 119) holds that the three-judge court was without jurisdiction to dismiss the ancillary matter.

Petitioners, Public Service Commission, State Highway Commission, Superintendent of State Highway Patrol, and the Attorney General, seek to have the opinion reviewed on the grounds that (1) it conflicts with itself; (2) it conflicts with other cases in the Eighth and other circuits; (3) it conflicts with cases of the Supreme Court; (4) it calls for the supervising control of the Supreme Court to clarify a matter of importance to the State of Missouri.

Short Statement. The history of the case may be briefly stated, as follows:

The aforesaid seventy-six (76) common carriers by motor vehicle filed their Bill In Equity, (R. 2), on May 15, 1937, in the District Court at Kansas City, attacking the validity of the schedule of common carrier truck fees in the Missouri Bus and Truck Law, Section 5272, Laws of Missouri, 1931, pp. 304-316, inclusive. A temporary restraining order (R. 20, 23) was granted. It remained in effect for a period of fifteen (15) months. Collection of the statutory fees in question was restrained thereby in the meantime.

The defendants timely filed an Amended Answer and Counterclaim (R. 63), alleging therein that, on behalf of the state of Missouri, they were entitled to a judgment against plaintiffs for statutory common carrier fees which plantiffs would have been compelled to pay, as annual and temporary license fees for the maintenance and repair of the public highways, except for the effectiveness of the temporary restraining order for a period of fifteen (15) months.

At the hearing on the injunction matter, the three-judge court stated (R. 81) that it would **"retain jurisdiction"** of the counterclaim until the injunction matter on the merits had been determined by it.

Several weeks later the Court, without further action concerning the counterclaim, entered its final decree (R. 69) on the merits of the injunction matter. The issues in the injunction matter were found for the defendants. The temporary restraining order was dissolved and the request for injunction was denied.

In the same decree, paragraph 4, as amended, (R. 76) the Court, after stating

> **"that it was in serious doubt as to the right of defendants to maintain such a counterclaim"**

dismissed the same

> **"without prejudice to the right of defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them shall be so advised."**

Realizing that plaintiffs could appeal directly to the Supreme Court from the adverse decree on their application for an injunction, and believing that jurisdiction of an appeal from the adverse decree of the three-judge court on the counterclaim, being ancillary to an injunction proceeding arising under the provisions of Section 266 of the Judicial Code, would be in the Supreme Court, defendants prosecuted their appeal from the adverse ruling on the counterclaim directly to the Supreme Court. The plaintiffs, however, did not appeal from the adverse decree on the injunction matter. Notwithstanding, it did not seem proper or necessary then that defendants should take another appeal to the Circuit Court of Appeals.

The Supreme Court, having before it only the direct appeal from the adverse ruling on the counterclaim, dismissed the direct appeal. It held that there was no proper appeal before it under Section 266 of the Judicial Code, and that it was without jurisdiction of the appeal on the counterclaim (Public Service Commission v. Brashear Freight Lines, Inc., et al., 306 U. S. 204, 83 L. Ed. 608).

The foregoing facts pertaining to the injunction and counterclaim proceedings set the stage for the present proceeding in certiorari pertaining to the Motion for Damages.

Further historical facts are as follows:

After the Supreme Court, for want of jurisdiction, had dismissed the aforesaid direct appeal taken from the adverse decree of the District Court on the counterclaim, it was too late for defendants to appeal from such adverse ruling of the three-judge court on the counterclaim to the Circuit Court of Appeals. They, therefore, conceived it to be proper to incorporate the same subject matter of the counterclaim pertaining to loss of the license fees in a Motion for Damages

against plaintiffs and the surety on their injunction bonds. They included also in said Motion for Damages (R. 90) a claim for expenses incurred in preparing and prosecuting their respective defenses.

The possible loss of the specific statutory fees mentioned in the Motion for Damages, collection of which had been restrained, was safeguarded by injunction bonds (R. 22, 30), in the amounts of Ten Thousand ($10,000.00) and Twenty Thousand ($20,000.00) Dollars, respectively. The former ran to the defendants (petitioners here), and the latter ran to the State of Missouri and the State Treasurer of the State of Missouri in addition to defendants.

The three-judge court overruled the Motion for Damages, explaining that (R. 94), inasmuch as the counterclaim had been dismissed,

> **"the subject matter and relief prayed for in defendants' Motion for Damages . . . has heretofore been ruled and finally determined."**

An appeal from the adverse ruling on the Motion for Damages was duly prosecuted to the Eighth Circuit Court of Appeals, and submitted on briefs. It is the opinion of that Court (R. 113) which petitioners seek hereby to have reviewed.

The statement of points upon which appellants relied in the Eighth Circuit Court of Appeals (R. 108) is as follows:

1. The Court abused its discretion in overruling defendants' motion for damages filed on May 22, 1939.
2. The Court erred in overruling the aforesaid motion for damages on the grounds that none of the defendants, especially defendant Public Service Commission, are proper parties to maintain an action in damages against plaintiffs for failure and refusal to deposit all of the statutory license fees with the Trustee, as they were obligated to do under the terms of the Stipulation of parties which was by the Court incorporated into its temporary restraining order.
3. The Court erred in overruling the aforesaid motion and relegating defendants to seventy-six (76) separate actions at law in many different States to recover statutory fees for the use of the public highways,

which fees the Court itself ordered plaintiffs to deposit with the Trustee named in the Stipulation of parties, and which fees plaintiffs failed and refused to deposit with said Trustee.

Without deciding the question of whether or not the Public Service Commission or the Attorney General of Missouri are proper parties to maintain the Motion for Damages, the Circuit Court of Appeals affirmed the order of the District Court overruling the Motion for Damages on the ground that, as hereinbefore stated, the three-judge district court did not abuse its discretion (R. 119), although it relegated defendants to seventy-six (76) separate actions at law in many different forums in several different States. It so held notwithstanding the fact that the damages in question, i. e., the unpaid license fees, accrued as a direct result of the improvidently issued restraining order. It held so notwithstanding the fact that the District Court deprived the State of its right to restitution of the statutory fees in question, which plaintiffs had kept in violation of the temporary restraining order. It so held notwithstanding the fact that, in the same opinion, it also held that the ancillary matter **should have been** referred back to the single judge who issued the temporary restraining order for action independent of the provisions of Section 266 of the Judicial Code. It so held notwithstanding the fact that the District Court dismissed both the counterclaim and the Motion for Damages on the grounds that it was in serious doubt that any of defendants were proper parties to maintain the ancillary cause of action against plaintiffs.

The dissenting judge (R. 119) approved the ruling that the ancillary matter **should have been** referred back to the district judge who granted the temporary restraining order, for proper action thereon independently of the provisions of Section 266 of the Judicial Code, but he also held that, because of the aforesaid ruling, the three-judge court was therefore without jurisdiction to dismiss the ancillary matter. Obviously, he dissented on the grounds that the Circuit Court of Appeals did not dispose of the ancillary litigation in a manner consistent with its principal ruling concerning such ancillary litigation.

A petition for rehearing (R. 121) was filed in the Circuit Court of Appeals. By means of said petition for rehearing,

appellants urged that the Court had overlooked the fact that its action would relegate appellants (defendants below) to seventy-six (76) separate actions at law, without the protection of the injunction bonds, in many separate forums in several different states, whereas the case upon which it relied (United Motors Service, Inc. v. Tropic Aire, Inc., Eighth Circuit, 57 F. (2d) 479) was a patent infringement action in a single-judge court, in which defendant was relegated to a court of law to try his action for damages against a single principal and his surety. The petition further pointed out several inaccurate statements made by the Circuit Court of Appeals which were not only unfair to appellants but which indicated strongly that the Court had not clearly understood the facts, and that said misunderstanding had contributed substantially to its error of judgment. The petition for rehearing also urged that appellants were entitled to damages to remunerate them for moneys expended in preparing and presenting their respective defenses. It also urged that the District Court did not base its action upon its alleged discretionary right to relegate defendants to seventy-six (76) separate causes of action in different forums in different states, but on its "serious doubts as to the right of the defendants to maintain such counterclaim" or Motion For Damages. The aforesaid petition for rehearing was denied (R. 135).

Thereafter, appellants filed their Motion for Stay of Mandate (R. 135), and the Court entered its Order Staying Mandate (R. 136).

II.

Jurisdictional Statement.

Section 240, amended, Judicial Code (28 USCA 347), invests the Supreme Court with jurisdiction to require by certiorari that the cause sought to be reviewed shall be certified to it.

The date of the judgment or decree sought to be reviewed (R. 120) is August 26, 1940. The date of the opinion (R. 113) is also August 26, 1940.

It is believed that the case sought to be reviewed is within the jurisdiction of the Supreme Court because, as hereinbefore more fully stated, it involves an ancillary cause of action for "damages", or for collection of statutory license

fees, against seventy-six (76) interstate, non-resident common carriers of property by motor vehicle, who brought their Bill In Equity to enjoin state officers and state departments from collection of said fees, provided by Section 5272, Laws of Missouri, 1931, pp. 304-316, on the ground that said fees were excessive and therefore unconstitutional. Brashear Freight Lines, Inc., et al. v. Public Service Commission of the State of Missouri, et al., 23 Fed. Supp. 865.

A temporary restraining order was in effect for a period of fifteen (15) months, during which time defendants in the injunction suit were restrained from collecting the fees in question, and during which time the aforesaid seventy-six (76) plaintiffs failed and refused to deposit the fees in question with a trustee pending the outcome of the injunction suit, as they were obligated to do under the terms of the temporary restraining order (R. 23).

The district court composed of three judges took jurisdiction of the Bill In Equity under the provisions of Section 266 of the Judicial Code. The ancillary cause of action in question is included in a Motion For Damages, which was filed by defendant state officers and departments, to collect the aforesaid statutory fees from plaintiffs on behalf of the State of Missouri.

The Circuit Court of Appeals affirmed the judgment of the District Court overruling the aforesaid Motion For Damages. It is believed that the action of the Circuit Court of Appeals is subject to review on grounds of conflict, the need of the exercise of the supervisory powers of this Court, and the need for a clear rule of procedure involving counterclaims or other cross pleadings requesting affirmative relief in injunction cases brought under Section 266.

III.

The Questions Presented.

This proceeding presents the following questions, namely:

(1) Did the three-judge court, as a specially constituted court, have power to **"retain jurisdiction"** of the subject matter of either the counterclaim or the Motion For Damages?

(2) If so, did the three-judge court abuse its discretion by overruling defendants' Motion For Damages

against plaintiffs and the surety on their two injunction bonds, thereby relegating them, state officers and departments, to seventy-six (76) separate actions at law in many different forums in numerous States?

(3) Were defendants, or any of them, proper parties to maintain a summary action against the injunction bonds for a money judgment, on behalf of the State of Missouri, for statutory license fees, collection of which had been restrained for fifteen (15) months, and deposit of which with the trustee, in accordance with the terms of the temporary restraining order, had been throughout said time refused by plaintiffs?

(4) Or, if the action of the three judges to **"retain jurisdiction"** was a valid action of a single-judge court, did the Court, as thusly constituted, abuse its discretion or otherwise dispose of the subject matter of the Motion For Damages improperly?

IV.

Reasons Relied on for the Allowance of the Writ.

1. In the absence of any rule whatsoever governing the disposition of the subject matter of the Motion For Damages, or of similar subject matter, which arises out of an action for injunction under Section 266 of the Judicial Code, whether the subject matter be in the nature of damages on the injunction bond or restitution of license fees wrongfully withheld by plaintiffs, the Supreme Court is requested to grant certiorari to afford an opportunity to declare a clear rule.

It is believed that there are no cases in the reports, arising out of causes of actions considered by specially constituted three-judge courts, which clearly indicate the procedure to be followed in a like case. Since the matter is of importance to the State of Missouri, and to these petitioners, in the administration of a statewide statute applying to freight-carrying motor carriers engaged in interstate commerce from almost every state in the nation, it is requested that the Court will grant certiorari for the purpose of affording opportunity to declare a clear rule.

2. The majority opinion is in conflict with the general rule for disposing of claims against sureties on injunction bonds in the same and other circuits.

The Court held that

> "the proper procedure in such a situation as here presented **requires** that the three-judge court, which has discharged its essential function of adjudicating upon constitutionality, **should,** upon presentation of facts by the parties, remit such ancillary litigation to the District Judge for proceedings 'to be taken independently of Section 266 of the Judicial Code, ... '"

The Court announced the foregoing rule, and immediately disregarded it. The Court disregarded the rule announced, as shown by the fact that it did not remit the ancillary litigation in question to the single district judge who granted the temporary restraining order, and who fixed its conditions (R. 23), for proceedings to be taken independently of Section 266 of the Judicial Code.'

3. The dissenting opinion holds that the foregoing rule of the majority opinion is a sound one for three-judge courts acting under Section 266 of the Judicial Code. It concludes, therefore, that, on account of the aforesaid rule, the three-judge court was without jurisdiction to dismiss the ancillary litigation, and that said litigation should have been remitted to the single district judge, who granted the temporary restraining order and fixed its conditions, for proceedings to be taken independently of Section 266 of the Judicial Code. The dissent is based upon conflict between the rule announced and the action of the Court in approving dismissal of the ancillary litigation by the three-judge district court.

4. he opinion does not criticize or overrule the action taken in a like ancillary matter in the case of Eichholz v. Hargus (Chairman of the Public Service Commission), 23 Fed. Supp. 587, wherein a three-judge district court, Western District of Missouri, proceeding under Section 266 of the Judicial Code, in a matter also in-

volving the Missouri Bus and Truck Law, took jurisdiction of a counterclaim for statutory license fees, also arising under Section 5272 aforesaid, and rendered a final money judgment in favor of the Commission. It is uncertain, therefore, whether the present opinion is sufficiently clear. It is important to the State of Missouri that a clear rule on the matter involved should be established.

5. The opinion announces the rule that ancillary litigation in injunction proceedings brought under section 266 of the Judicial Code **must be** disposed of by the single judge who granted the temporary restraining order. Such a rule is not supported by the United Motors Service case, nor by the other cases cited in the margin (R. 119). Of the latter cases involving specially constituted three-judge courts, none gave consideration to an ancillary matter in the nature of a claim for damages against sureties, arising out of an improvidently issued restraining order.

6. The opinion, by holding that ancillary litigation in injunction proceedings brought under Section 266 of the Judicial Code **must be** remitted to the single district judge who granted the temporary restraining order, is in conflict with opinions of the Supreme Court. If not in direct conflict with such opinions, it clearly reveals that the Circuit Court of Appeals has failed to interpret such opinions correctly.

7. The opinion is in conflict with opinions of the Supreme Court, and of other circuit courts, allowing defendants, as a matter of right, to recover as damages proper expenses incurred in preparing and presenting their respective defenses.

8. The opinion is based upon the erroneous assumption that the district court dismissed defendants' Counterclaim and Motion For Damages, respectively, on the ground of its supposedly discretionary right to relegate defendants to seventy-six (76) separate actions at law to collect the statutory license fees in question, whereas the three orders (R. 70, 83, 94) of the three-judge court pertaining to the Counterclaim and the Motion For

Damages, respectively, reveal that the Court dismissed those ancillary matters on the ground that it was in serious doubt that any of the defendants were proper parties to maintain an action for collection of the statutory license fees involved. The fact that the Circuit Court of Appeals did not decide the case upon the controlling question for decision, as indicated by the orders of the three-judge court, warrants the exercise of this Court's power of supervision.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 11,618, Civil, Public Service Commission of the State of Missouri, et al., Appellants v. Brashear Freight Lines, Inc., et al., Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court; and for such further relief as to this Court may seem proper.

Dated October 28, 1940.

Attorneys for Petitioners:

JAMES H. LINTON,
DANIEL C. ROGERS,
COVELL R. HEWITT,
LOUIS V. STIGALL,
WILKIE B. CUNNYNGHAM,
Jefferson City, Missouri.

EDGAR H. WAYMAN,
HAROLD C. HANKE,
St. Louis, Missouri.

SUPPORTING BRIEF AND ARGUMENT.

Citation of Opinion. The opinion of the Circuit Court of Appeals (R. 113) is reported as follows:

> Public Service Commission of the State of Missouri, et al. v. Brashear Freight Lines, Inc., et al., Circuit Court of Appeals, Eighth Circuit, 114 F. (2d) 1 (Adv. Op.).

Statement. A statement of the case has been included in the Petition for Certiorari contained herein.

Specification of Reasons for Allowance of Writ. The same reasons relied on for the allowance of the writ as are contained in the petition for certiorari are urged in this Supporting Brief.

Argument. (1) The majority opinion is not only in direct conflict with itself, and with the **Eichholz** case, 23 Fed. Supp. 587, which was tried in the District Court, Western District of Missouri, but it is in conflict with other cases in the same and other circuits. In the Eichholz case, a specially constituted three-judge district court, proceeding under Section 266, took jurisdiction of a counterclaim for statutory license fees under Section 5272 of the Missouri Bus and Truck Law and rendered a final money judgment in favor of the Public Service Commission.

The majority opinion holds that an ancillary matter like the one in question **must be** remitted back to the single judge who granted the temporary restraining order. If that rule is permitted to stand, then it follows that the specially constituted court of three judges did not have power to **"retain jurisdiction"** of the ancillary matter from the commencement of the cause of action for injunction, or to dismiss it afterwards.

If the action of the three judges in dismissing the ancillary cause of action shall be regarded as the act of an ordinarily constituted one-judge district court, it disposed of the matter in a manner in conflict with the general rule in effect in all circuits concerning summary action against sureties on injunction bonds. It is in conflict also with the rule in the Supreme Court, as announced in **Russell v. Farley,** 105 U. S. 433, as follows (l. c. 445):

"Other cases are referred to by the counsel of the appellants to sustain their position; but upon a careful examination we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the Court of Chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice, and put an end to further litigation."

In **Inland Steel Company v. United States,** 306 U. S. 153, 83 L. Ed. 557, 560, this Court, speaking of a specially constituted three-judge court, quoted approvingly from Russell v. Farley.

In other words, the Courts, acting as ordinarily constituted one-judge courts, or as specially constituted three-judge courts, have power to exercise a discretion at least. Usually it is fitting that the Court should **"retain jurisdiction"** to do complete justice.

Even in the case of **United Motors Service v. Tropic-Aire,** 57 F. (2d) 479, relied on as authority in the Eighth Circuit for affirming the order dismissing the ancillary cause of action, the Court clearly indicated that it would be improper to relegate a defendant to an action at law on the injunction bond if affirmative relief is asked in defendant's pleading. In that case no affirmative relief was asked in defendant's pleading; hence there was no abuse of discretion by refusing to assess damages under the injunction bond in the equity suit proper. But the Court, nevertheless, directly recognized the existing rule of **Russell v. Farley,** supra. It also said (page 485):

"Many courts of original jurisdiction have laid down rules with reference to this matter and have regarded it as the *better practice* for the court in the equity suit to

determine the damages. For instance, in Owl Creek Coal Co. v. Big Horn Collieries Co. (D. C.), 36 F. (2d) 485, the court reviews many of the federal decisions upon the subject and states that defendant may in an ancillary proceeding summarily enforce a bond against the surety, and that the defendant ordinarily will not be remitted to his remedy at law. Same doctrine Lea v. Deakin (C. C.), 13 F. 514." (Italics supplied.)

In **Owl Creek Coal Co. v. Big Horn Collieries** 36 F. (2d) 485, (Tenth Circuit), Russell v. Farley, supra, is also quoted at length. Cases from several other circuits are also quoted, showing that Russell v. Farley, supra, is uniformly followed in all the circuits. The Court said:

"From the foregoing it would appear that **all the federal courts, District, Circuit, and Appellate,** in the cases at least which are cited by counsel, *have been unanimous in adopting the suggestion laid down by the Supreme Court in Russell v. Farley.*

I see no good reason why the rule should not be adopted here, not only upon the reasoning which would seem to sustain it and which is not necessary to reiterate here, but also upon the ground of expediency and order, with the object in view of seasonably terminating all litigation possible in the same suit.

For the reasons stated, the motion to strike the second counterclaim will be overruled and denied, reserving to the litigants, respectively, their several exceptions to the adverse rulings herein indicated." (Italics supplied.)

Summarizing, if the action of the district court of three judges was that of a specially constituted three-judge court under Section 266 of the Judicial Code, it was without authority to dismiss the Motion for Damages if such specially constituted courts **must remit** to the single judge the ancillary matter; and, if it was the action of an ordinarily constituted one-judge court, it acted in conflict with the uniform rule in all circuits permitting the court, in its discretion, to render judgment for damages on the injunction bond in the main equity proceeding, **and favoring such action except in rare cases.**

It is believed that there is no reported case showing a dismissal of a defense pleading for affirmative relief, and surely no case of record where several state officers and state departments are relegated to a burdensome number of separate actions at law in many different forums in different states to collect statutory license fees which the seventy-six (76) plaintiffs were obligated to deposit with the trustee under the terms of the temporary restraining order, and which restraining order plaintiffs violated for fifteen months and thereby violated the express conditions of their injunction bonds.

In **Camp v. Boyd,** 229 U. S. 530, l. c. 551-552, the Court said:

> "A court of equity ought to do justice completely, and not by halves. (Citing cases.)
>
> One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority."

Moreover, this Court, in **Pease v. Rathbun-Jones Engineering Company,** 243 U. S. 273, l. c. 279, said:

> "The objection that a court of equity has no jurisdiction because there is an adequate remedy at law on the bond is not well taken. A court of equity, having jurisdiction of the principal case, will completely dispose of its incidents and put an end to further litigation. Applying this principle equity courts, upon the dissolution of an injunction, commonly render a summary decree on injunction bonds."

The specially constituted three-judge court in the Eichholz case, supra, applied the above rule of the Pease case.

(2) There is another line of cases which hold that a court of equity, even specially constituted three-judge courts, will retain jurisdiction to do complete justice.

In **Sterling v. Constantin,** 287 U. S. 378, 393, 394, 77 L. Ed. 375, 383, this Court said.

> "The jurisdiction of the District Court so constituted (three judges), and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the c. rt to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. Siler v. Louisville & N. R. Co., 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 S. Ct. 451; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 303, 58 L. ed. 229, 238, 34 S. Ct. 48; Davis v. Wallace, 257 U. S. 478, 482, 66 L. ed. 325, 328, 42 S. Ct. 164; W. T. Waggoner Estate v. Wichita County, 273 U. S. 113, 116, 71 L. ed. 566, 568, 47 S. Ct. 271."

In **Railroad Commission of the State of California v. Pacific Gas & Electric Company,** 302 U. S. 388, 391, 82 L. ed. 319, 321, the Court said, in another Section 266 case:

> "Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal. Siler v. Louisville & N. R. Co., 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 S. Ct. 451; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 303, 58 L. ed. 229, 238, 34 S. Ct. 48; United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300 307, 73 L. ed. 390, 395, 49 S. Ct. 150."

Also see **Sovereign Camp, W. O. W. v. Murphy,** 17 Fed. Supp. 651, where a three-judge court in the Eighth Circuit, acting under Section 266, followed the above principle and cited the above cases.

(3) In three cases involving **counterclaims** this Court has said that equity courts will do complete justice:

Leman v. Krentler-Arnold Hinge Last Company, 284 U. S. 448, 451, 76 L. ed. 389, 393;

Young Company v. McNeal-Edwards Company, 283 U. S. 398, 400, 75 L. ed. 1140, 1141-1142;

Chicago & Northwestern Railway Company v. Lindell, 281 U. S. 14, 17, 74 L. ed. 670, 672.

In the last cited case, the Court said:

"The adjustment of defendant's demand by counterclaim in plaintiff's action rather than by independent suit is favored and encouraged by the law. That practice serves to avoid circuity of action, inconvenience, expense, consumption of the court's time and injustice. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 615, 616, 38 L. ed. 565, 571, 572, 14 Sup. Ct. Rep. 710; Florida R. Co. v. Smith, 21 Wall. 255, 261, 22 L. ed. 513, 514; Partridge v. Phoenix Mut. L. Ins. Co., 15 Wall. 573, 579, 21 L. ed. 229, 230. In the case last mentioned, the court, speaking through Mr. Justice Miller, said (p. 580):

> *'It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal set-offs and counterclaims to be interposed and tried in the same suit and in the same form'."* (Italics supplied.)

This is the second effort made by petitioners to have their day in court on the merits against the seventy-six (76) respondents (plaintiffs below). It is the second time the matter has been brought to this Court.

In Public Service Commission of the State of Missouri, et al. v. Brashear Freight Lines, Inc., et al., 306 U. S. 204, 83 L. Ed. 608, the Court dismissed outright the appeal of these petitioners. Although appropriate relief was requested, in case the Court should find the appeal to be taken to the wrong court, such request was not granted. In the aforesaid appeal there was a judgment and decree of the specially constituted three-judge court denying the injunction and dissolving the temporary restraining order. It was an unquestioned proper judgment for a direct appeal.

Believing that plaintiffs below would prosecute a direct appeal from the adverse ruling on the injunction, **and believing that the jurisdiction of the Supreme Court thereof invoked the jurisdiction of that Court on the ancillary matter,** an appeal was prosecuted by said officers to the Supreme Court,

only. The Court dismissed the appeal outright for want of jurisdiction. Within a very short time afterwards the Court, however, following Oklahoma Gas and Electric Company v. Oklahoma Packing Company, 292 U. S. 386, 78 L. Ed. 1318, made an appropriate ruling saving three other appellants from improvident direct appeals. See William Jameson & Co. v. Morgenthau, 307 U. S. 171, 83 L. Ed. 1189; Rorick v. Board of Commissioners of Everglades Drainage District, 307 U. S. 208, 83 L. Ed. 1242; Wilentz v. Sovereign Camp, W. O. W., 306 U. S. 573, 83 L. Ed. 994.

IN CONCLUSION, it is requested that the Court, for the reasons herein set forth, will grant certiorari and fix a proper and clear rule for procedure in matters like the one herein presented.

Respectfully submitted,

Attorneys for Petitioners:

JAMES H. LINTON,
DANIEL C. ROGERS,
COVELL R. HEWITT,
LOUIS V. STIGALL,
WILKIE B. CUNNYNGHAM,
Jefferson Clty, Missouri.

EDGAR H. WAYMAN,
HAROLD C. HANKE,
St. Louis, Missouri.

BLANK PAGE

BLANK PAGE

Office - Supreme Court, U. S.
FILED
JAN 24 1941
CHARLES ELMORE CROPLEY
CLERK

No. 549.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, et al., *Petitioners*,

vs.

BRASHEAR FREIGHT LINES, INC., et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

Attorneys for Petitioners:
JAMES H. LINTON,
DANIEL C. ROGERS,
COVELL R. HEWITT,
LOUIS V. STIGALL,
WILKIE B. CUNNYNGHAM,
Jefferson City, Missouri.

EDGAR H. WAYMAN,
HAROLD C. HANKE,
St. Louis, Missouri.

BLANK PAGE

No. 549.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, et al., *Petitioners*,

vs.

BRASHEAR FREIGHT LINES, INC., et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

Attorneys for Petitioners:
JAMES H. LINTON,
DANIEL C. ROGERS,
COVELL R. HEWITT,
LOUIS V. STIGALL,
WILKIE B. CUNNYNGHAM,
Jefferson City, Missouri.

EDGAR H. WAYMAN,
HAROLD C. HANKE,
St. Louis, Missouri.

BLANK PAGE

INDEX.

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
I Right Party to Action	2
II Abuse of Discretion	2
III Proper Rule of Procedure	2
Statutes and Regulations involved	2
STATEMENT OF THE CASE	3
Preliminary explanation	3
Remote history of case	4
Recent history of case	7
Specification of errors to be urged	8
I Opinion below left primary question undecided, namely, whether petitioners are right parties to maintain Motion For Damages	8
II Abuse of Judicial Discretion	8
III Proper Procedural Rule Not Ordered	9
Summary of argument	9
Specification I	9
A Primary question not decided	9
B Petitioners right parties to maintain Motion For Damages	10
Specification II	11
A Abuse of Discretion	11
Specification III	13
A Proper Rule for Trial of Motion For Damages	13
ARGUMENT:	
I.	
A. Preliminary Suggestions	15
B. Primary Question for Decision	16
C. Equity Alone Invests Petitioners with Right to Maintain Motion For Damages	18
D. Missouri Statutes Authorize Public Service Commission to Sue for License Fees	21
E. Public Service Commission Rules Reveal Administrative Practice	24
F. Implied Powers of Public Service Commission	26
G. Eichholz Case Holds Public Service Commission May Sue For License Fees	29
H. Attorney General May Sue for License Fees	31
II.	
A. Preliminary Discussion	32
B. Secondary Question for Decision	32
C. Discussion of Applicable Decisions	33, 34
(1) United Motors Service v. Tropic-Aire, Inc	33, 34, 35

Page

(2) Eichholz Case 36
(3) Russell v. Farley 36
(4) Inland Steel v. United States 37
(5) Owl Creek Coal Co. v. Big Horn 37
(6) Camp v. Boyd 38
(7) Pease v. Rathbun-Jones 38
D. Equity Will Do Complete Justice 39
(1) Sterling v. Constantin 39
(2) R. R. Comm. v. P G & El 39
(3) Sovereign Camp WOW v. Murphy 39
(4) Leman v. Krentler-Arnold 39
(5) Young Co. v. McNeal Ed 40
(6) C. N. W. Ry. Co. v. Lindell 40
E. Abuse of Discretion to Disallow Defense Expenses 40

III.

A. Necessity for Clear Procedural Rule for Trial of Ancillary Matters Arising in Actions Brought Under Section 266 of the Judicial Code 41
Conclusion 44
Appendix 45

CASES AND STATUTES CITED.

Page

Camp v. Boyd, 229 U. S. 530 38
Chicago & Northwestern Railway Company v. Lindell, 281 U. S. 14, 17 40
Columbia Terminals v. Lambert, et al., 309 U. S. 620 41
Eichholz v. Hargus, et al., 23 Fed. Supp. 587 .....17, 29, 30, 36
Frank Eichholz vs. Public Service Commission, 306 U. S. 268 30
Inland Steel Company v. United States, 306 U. S. 153 37
William Jameson & Co. v. Morgenthau, 307 U. S. 171 43
Leman v. Krentler-Arnold Hinge Last Company, 284 U. S. 448, 451 .. 39
Oklahoma Gas and Electric Company v. Oklahoma Packing Company, 292 U. S. 306 43
Owl Creek Coal Co. v. Big Horn Collieries, 36 F. (2d) 485 37
Pease v. Rathbun-Jones Engineering Company, 243 U. S. 273, 279 ... 38
Public Service Commission v. Brashear, et al., 306 U. S. 204 .....6, 41
Public Service Commission v. Columbia Terminals, 309 U. S. 620 41
Railroad Commission of California v. Pacific Gas & Electric Company, 302 U. S. 388, 391 39
Rorick v. Board of Commissioners of Everglades Drainage District, 307 U. S. 208 43
Russell v. Farley, 105 U. S. 433 36
Sovereign Camp, W. O. W. v. Murphy, 17 Fed. Supp. 651 39
Sterling v. Constantin, 287 U. S. 378, 393, 394 39
State ex rel. v. Bronson, 115 Mo. 271, 21 S. W. 1125 32
State v. Creamery Co., 211 Mo. App. 116, 245 S. W. 361 32
State ex rel. v. Williams, 221 Mo. 227, 260, 120 S. W. 740 32
United Motors Service, Inc. v. Tropic-Aire, Inc., 57 Fed. (2d) 479 .. 35

Page

Wilentz v. Sovereign Camp, W. O. W., 306 U. S. 573 43
Young Company v. McNeal-Edwards Company, 283 U. S. 398, 400... 40

Section 240, Judicial Code, 28 USCA 347 1
Section 266, Judicial Code, 28 USCA 380 .... 2, 4, 9, 15, 16, 29, 36, 37, 41, 42

*Missouri Bus and Truck Law, Laws of Missouri, 1931, pp. 304-316, Sections 5264-5280, inclusive 2, 4
Section 5123, R. S. Mo. 1929 26
5127, R. S. Mo. 1929 27
5131, R. S. Mo. 1929 27
5163, R. S. Mo. 1929 27
5166, R. S. Mo. 1929 27
5229, R. S. Mo. 1929 27
5230, R. S. Mo. 1929 28
5236, R. S. Mo. 1929 28
*Section 5267 21
5267-a 11, 21
5267-b 21
5267-c 26
5268-b 22
5272 ..... 4, 19, 22, 23
5280 24
Section 11276, R. S. Mo. 1929 ..... 11, 31

Public Service Commission Rule No. 8 25
Public Service Commission Rule No. 13 25
Public Service Commission Rule No. 14-B 25
Public Service Commission Rule No. 15-B 26

BLANK PAGE

No. 549.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, et al., *Petitioners*,

vs.

BRASHEAR FREIGHT LINES, INC., et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 99) is reported in 114 F. (2d) 1. The decree of the District Court, paragraph 4 of which, as modified, constitutes the basis of the appeal to the Circuit Court, appears in the record only (R. 67). The opinion of the District Court, 23 Fed. Supp. 865, deals solely with the injunction matter. It is, therefore, of indirect interest only.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on August 26, 1940 (R. 105). The petition for a writ of certiorari was filed on November 4, 1940, and was granted on December 16, 1940 (R. 107). The jurisdiction of this Court rests upon Section 240 of the Judicial Code, as amended, (28 USCA 347).

THE QUESTIONS PRESENTED.

This proceeding presents the following questions, namely:

I.

Are petitioners (defendants below), or any of them, proper parties to maintain an ancillary action against plaintiffs and the sureties on their two injunction bonds for a money judgment, on behalf of the State of Missouri, for statutory, road-use license fees, collection of which was restrained for fifteen (15) months, and deposit of which with the trustee, in accordance with the terms of the temporary restraining order, throughout said time was refused by plaintiffs?

II.

If so, did the specially constituted three-judge District Court abuse its discretion by overruling defendants' Motion For Damages against plaintiffs and the surety on their two injunction bonds, (considering the condition of the temporary restraining order and the wilful violation thereof) thereby relegating them, state officers and departments, to seventy-six (76) separate actions at law or in equity in many different forums in numerous states?

III.

Was it not the duty of the specially constituted three-judge District Court, upon consideration of the fact that it found the issues on the injunction matter in favor of the defendants, to remand the Motion For Damages to the single judge, who granted the temporary restraining order and fixed its conditions, for proceedings to be taken thereon independently of the provisions of Section 266 of the Judicial Code?

STATUTES AND REGULATIONS INVOLVED.

This proceeding involves construction of pertinent portions of the Missouri Bus and Truck Law, Laws of Missouri, 1931, pages 304-316, Sections 5264-5280, inclusive, which will be incorporated herein to the extent needed. It also involves consideration of Public Service Commission regulations promulgated thereunder (R. 90-93).

STATEMENT OF THE CASE.

Preliminary explanation. In an injunction proceeding, arising under the provisions of Section 266 of the Judicial Code, a three-judge district court, Western District of Missouri, overruled defendants' Motion For Damages (R. 83, 79), against seventy-six common carrier truck operators; plaintiffs, and the surety on their two injunction bonds. The Eighth Circuit Court of Appeals affirmed the order, with one judge dissenting.

The aforesaid Motion For Damages (R. 79) of defendants, Public Service Commission, State Highway Commission, Superintendent of the Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney General of the State of Missouri, each in its or his own behalf and each in behalf of the State of Missouri, and of the State Treasurer of the State of Missouri, was filed in the District Court on May 22, 1939. It requested the Court

> ". . . . . to determine and assess damages and costs against each and every plaintiff in said cause and against the Massachusetts Bonding and Insurance Company to the extent of its liability as surety on two injunction bonds herein filed."

On July 5, 1939, the specially constituted District Court, consisting of three judges, without any hearing whatsoever, overruled the aforesaid motion in the following language (R. 83):

> "It appearing to the Court that the *subject matter* and and relief prayed for in defendants' motion for damages, filed May 22, 1939, has *heretofore* been ruled and finally determined in this cause, the motion referred to is hereby overruled." (Emphasis supplied.)

The Court's reference was to its prior dismissal of the Counterclaim which included a claim for fifteen months license fees, only. It had also been overruled without any hearing whatsoever.

The circumstances leading up to the appeal from the aforesaid order are as follows:

Remote History of Case. On May 15, 1937, the aforesaid seventy-six (76) common carriers of property by motor vehicle filed their bill in equity (R. 3-18), wherein they requested that defendants named therein (petitioners here) be restrained from enforcing against them the provisions of the Missouri Bus and Truck Law, Laws of Missouri, 1931, Sections 5264-5280, pages 304-316, inclusive. The principal attack of the plaintiffs was lodged against the common carrier fees provided in Section 5272 of said law for the maintenance and repair of public highways of the State of Missouri.

It was alleged in the petition that said statutory fees were excessive in amount, bore no reasonable relation to the use or extent of use of said public highways and were therefore unconstitutional and void. Also, on May 15, 1937, a single district judge, who afterwards called to his aid two additional judges as provided by Section 266 of the Judicial Code, granted a temporary restraining order (R. 18). The temporary restraining order was amended by said single judge (R. 20) on May 27, 1937, to include a stipulation of parties, whereby plaintiffs agreed to purchase *free of cost* from defendant Public Service Commission annual licenses, and daily licenses called "emergency travel orders," and to deposit the license fees therefor with a trustee for safekeeping until it should be decided by the courts whether the license fees were reasonable and therefore valid. The temporary restraining order remained in effect for a period of approximately fifteen months, namely, from May 15, 1937, until the final decree of the court was entered on August 4, 1938. Collection of the statutory fees by the Public Service Commission for remittance to the State Treasurer was restrained during said period of approximately fifteen months.

In accordance with the aforesaid stipulation (R. 20), by means of which the Court modified its temporary restraining order, a total sum of $104,015.43, representing *partial payment* of emergency and regular license fees deposited with the trustee by twenty-seven (27) of the seventy-six (76) plaintiffs, was remitted to defendant Public Service Commission by the trustee (R. 77-79) on May 17, 1939.

Two injuction bonds, one for Ten Thousand Dollars ($10,000.00) (R. 22 original), and one for Twenty Thousand Dollars ($20,000.00) (R. 30, original), were given by plaintiffs.

The bond for Twenty Thousand Dollars ($20,000.00) *which was filed last,* runs to defendant Public Service Commission of the State of Missouri, defendant State Highway Commission of the State of Missouri, defendant Missouri State Highway Patrol, defendant Attorney General, *also* to the State of Missouri and the State Treasurer of the State of Missouri. It provides that plaintiffs

> " . . . . . shall abide by the decision of said Court and pay all moneys and costs which shall be adjudged against them in case said restraining order shall be dissolved . . . . . "

Defendants' Joint Answer (R. 26) was filed on September 17, 1937. Said Joint Answer contained a *Counterclaim* for license fees owning by plaintiffs (R. 38). Plaintiffs filed a General Denial to the counterclaim (R. 40).

Thereafter, defendants filed an Amended Answer *and Counterclaim* (R. 55), alleging therein that *on behalf of the State of Missouri*, they were entitled to a judgment against plaintiffs for statutory common carrier license fees which plaintiffs would have been compelled to pay as annual and temporary license fees for the maintenance and repair of the public highways, except for the effectiveness of the temporary restraining order for a period of fifteen (15) months.

At the hearing on the injunction matter, the circuit judge who presided over the specially constituted three-judge District Court stated (R. 65, 71) that the Court would "*retain jurisdiction*" of the aforesaid Counterclaim until the injunction matter on the merits had been determined by it.

Several weeks later the Court, on August 4, 1938, without any action whatsoever in the meanwhile concerning the Counterclaim, filed its opinion and entered its *original* final decree (R. 61) disposing of the injunction matter on the merits. The issues in the injunction matter were found for the defendants. The temporary restraining order was dissolved and the request for injunction was denied.

The decree of the three-judge Court also provided (R. 62) as follows:

> "4. That as to the issue raised by the defendants' counterclaim, *not having been urged nor presented by the parties*, and the court being in doubt as to the

> right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them, shall be so advised."
>
> (*Emphasized clause omitted in response to Motion to Modify)

Paragraph 4 as modified included the word "*serious*," and reads that, (R. 67):

" . . . . . the Court being in *serious* doubt . . . . . "

On September 3, 1938, defendants filed their Petition for Rehearing and Motion to Modify the Decree (R. 62), which petition asked for (1) an opportunity to try the issues made upon the Counterclaim of defendants and the Answer of plaintiffs thereto, or (2) a modification of the portion of paragraph 4 of the decree stating that the Counterclaim had not been urged or presented by the parties.

On September 16, 1938, the Court ordered (R. 67) that paragraph 4 of the decree be modified, which modification eliminated from paragraph 4, as originally entered, the words, "*not having been urged nor presented by the parties.*" It also was modified to read "*serious doubt.*" Said order also denied and overruled defendants' Petition for Rehearing, and allowed an exception to such rulings.

Thereafter, the defendants duly prosecuted an appeal directly to the Supreme Court against paragraph 4 of the decree, as modified. The plaintiffs, however, did not prosecute an appeal from that portion of the decree of the Court dismissing their Bill of Equity and dissolving the temporary restraining order. The Supreme Court decided (Public Service Commission vs. Brashear, 306 U. S. 204) that,

> "It necessarily follows that, unless there is a proper appeal from a decree granting or denying an interlocutory or permanent injunction, the provision in Section 266 for a direct appeal to this court has no application. The appeal is dismissed."

An appropriate mandate (R. 76) issued by the Supreme Court was filed in the District Court on April 24, 1939.

The foregoing facts pertaining to the injunction and Counterclaim proceedings set the stage for the present proceeding in certiorari pertaining to the Motion For Damages.

Recent History of Case. *Further historical facts are as follows:*

After the Supreme Court, for want of jurisdiction, had dismissed the aforesaid direct appeal taken from the adverse decree of the District Court on the Counterclaim, it was too late for defendants to appeal from such adverse ruling of the three-judge court on the counterclaim to the Circuit Court of Appeals. They, therefore, conceived it to be proper to incorporate the same subject matter of the Counterclaim pertaining to loss of the license fees during the fifteen months they were restrained, *also a claim for expenses incurred* in preparing and presenting their respective defenses, in a Motion for Damages against plaintiffs and the surety on their two injunction bonds.

The Motion for Damages (R. 79-83), which is the real basis of this appeal and which was filed on May 22, 1939, requested the Court

> " . . . . to determine and assess damages and costs against each and every plaintiff in said cause, and against the Massachusetts Bonding and Insurance Company to the extent of its liability as surety on two injunction bonds herein filed."

On July 5, 1939, the District Court, consisting of three judges sitting as a specially constituted Court under the provisions of Section 266 of the Judicial Code, entered its Order Overruling Motion for Damages (R. 83). The substance of said order is as follows:

> "It appearing to the Court that the *subject matter* and the relief prayed for in defendants' Motion for Damages, filed May 22, 1939, has *heretofore* been ruled and finally determined in this cause, the motion above referred to is hereby overruled." (Emphasis supplied).

On July 15, 1939, defendants filed their Motion to Set Aside Order Overruling and to Reconsider Defendants' Motion for Damages (R. 83). Therein (R. 83), defendants set out alleged errors committed by the District Court in overruling

the aforesaid Motion for Damages, and presented Suggestions in Support of Motion to Set Aside Order Overruling and to Reconsider Defendants' Motion for Damages (R. 85).

On July 25, 1939, the Court entered its Order Overruling Motion to Set Aside Order Overruling Defendants' Motion for Damages (R. 89).

Thereupon an appeal from the adverse ruling of the three-judge District Court on the Motion for Damages was duly prosecuted to the Eighth Circuit Court of Appeals and submitted on briefs. The Eighth Circuit Court of Appeals affirmed the judgment and decree of the District Court. It is the opinion of that Court (R. 99) which is now before the Supreme Court for review. The Supreme Court granted certiorari on December 16, 1940 (R. 107).

SPECIFICATION OF ERRORS TO BE URGED.

I.

The opinion of the Circuit Court of Appeals is based upon the erroneous assumption that the district court dismissed defendants' Counterclaim and Motion For Damages, respectively, on the ground of its supposedly discretionary right to relegate defendants to seventy-six (76) separate actions at law to collect the statutory license fees in question, whereas the three orders (R. 61, 67, 83) of the three-judge court pertaining to the Counterclaim and thereafter to the Motion For Damages, respectively, reveal that the District Court dismissed first, the Counterclaim and thereafter the Motion for Damages on the ground that it was "in doubt" and thereafter in "*serious*" doubt as to the right of any of the defendants to maintain such ancillary causes of action for collection of the statutory, road-use license fees involved.

II.

The Circuit Court of Appeals erred in its holding that the specially constituted three-judge District Court did not abuse its judicial discretion by relegating defendants (petitioners here) to seventy-six (76) different actions at law, or in equity, in many different forums in many different states.

III.

The Circuit Court of Appeals erred in that it did not remand the Motion For Damages to the District Court, with directions to the single district judge who granted the temporary restraining order and fixed its conditions to proceed to trial on the merits of said Motion For Damages independently of the provisions of Section 266 of the Judicial Code.

SUMMARY OF THE ARGUMENT.

Specification I.

A. Primary question not decided. When the District Court by its modified decree dismissed the Counterclaim, it said (R. 67):

> "4. That as to the issue raised by defendants' counterclaim, the court being in *serious* doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they or either of them shall be so advised." (Emphasis supplied)

Thereafter, when it overruled the Motion For Damages, it said (R. 83):

> "It appearing to the Court that the *subject matter* and the relief prayed for in defendants' Motion for Damages, filed May 22, 1939, has *heretofore* been ruled and finally determined in this cause, the motion above referred to is hereby overruled." (Emphasis supplied)

Thus it appears that the District Court dismissed the Counterclaim and subsequently overruled the Motion For Damages on the ground that it was in serious doubt "*as to the right of the defendants to maintain*" in an ancillary proceeding the cause of action pleaded in the Motion For Damages.

Suggestion is made, therefore, that the Circuit Court of Appeals left wholly undecided the primary question presented, namely, "*as to the right of the defendants* to maintain" in an ancillary proceeding the cause of action pleaded in the Motion

For Damages. This point was urged to the attention of the District Court (R. 83) in a motion to set aside its aforesaid order. It was preserved and fully briefed in the Circuit Court of Appeals. It was urged in the petition for rehearing (R. 121) in the Circuit Court of Appeals. It was finally urged in the printed petition for certiorari in this Court, first, at the top of page 5 thereof and secondly at the bottom of page 10 thereof.

Petitioners believe that the Supreme Court should decide whether or not the Public Service Commission or the Attorney General, (considering all of the circumstances of the injunction proceeding in which they were joined and restrained as defendants in the District Court), are entitled, as a matter of right, in an ancillary proceeding in the District Court, to collect from **or have restitution** of the seventy-six (76) common carrier plaintiffs, for and on behalf of the State of Missouri or the State Treasurer of the State of Missouri, the statutory, road-use license fees which said plaintiffs would have been obligated to pay, **and compelled to pay,** for the use, maintenance and repair of the public streets and highways of the State of Missouri, except for the effectiveness of the improvidently issued temporary restraining order for a period of fifteen (15) months.

B. Petitioners Right Parties to Maintain Motion for Damages. It is the contention of petitioners that *equity alone* invests the Public Service Commission with sufficient right to maintain the ancillary cause of action stated in the Motion For Damages. Obviously, the State is entitled to all of its road-use license fees due from plaintiffs below for the aforesaid period of time. A court of equity should not allow seventy-six (76) interstate carriers to have an order of a District Court to restrain the Public Service Commission, the Attorney General and other law enforcing officers from collection of such fees and thereafter, following dissolution of the improvidently issued restraining order, interpose merely technical reasons as a defense against the effort of said law enforcing agencies to collect said road-use license fees for the State.

In any event, petitioners contend that the Public Service Commission or the Attorney General have more grounds than those based upon equity alone for maintaining the cause of action pleaded in the Motion For Damages.

As to the Public Service Commission, Section 5267-(a), Laws of Missouri, 1931, pages 304-316, inclusive, provides:

> "The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state . . . . . ."

The power to license includes the power to collect, and to maintain an action to collect the license fees, by an action at law or equity, if necessary. Such is the correct legal conclusion when the intent of the act as a whole is considered, and when it is also considered that the Commission has *always* collected the license fees due under the provisions of Section 5272 of the aforesaid law.

As to the Attorney General, Section 11,276, Vol. I, Mo. St. Ann., p. 586, R. S. Mo., 1929, provides:

> "The Attorney General shall institute, in the name and on behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved."

Hence, it is contended that both petitioners named above, who were joined as defendants in the injunction petition of plaintiffs, have *legal grounds* for maintaining the ancillary cause of action pleaded in the Motion For Damages.

Specification II.

A. Abuse of Discretion. The statutory license fees, which accrued as "*damages*", accrued by reason of the fact that plaintiffs below flagrantly violated the terms of the temporary restraining order throughout the period of fifteen (15) months it was in effect. Although, by the express terms of the temporary restraining order, plaintiffs were required to deposit the statutory fees in question with the person named as trustee in the temporary restraining order, as amended, (R. 22), each and every one of the seventy-six (76) plaintiffs

violated those terms. They violated them by their failure and refusal to deposit road use fees at least for the shorter distances mentioned in the opinion of the Circuit Court of Appeals. It is suggested that such long continued violation of the terms of the temporary restraining order constituted a grave fraud against the rights of the State of Missouri, and a flagrant contempt of the District Court itself.

Concerning two contempt motions, and the counterclaim, the subject matter of which was later incorporated in the Motion For Damges, now in question, the presiding judge of the three-judge District Court said (R. 65, 71):

> "We may clear up part of it now. The *cross complaint* and the contempt motions in this case, if the Court should sustain the position of the defendants, *we will retain jurisdiction of those matters*, but will not hear them now." (Emphasis supplied.)

The fraud went without remedy. The three-judge court, although assuming jurisdiction, refused to do anything whatsoever. It dismissed the counterclaim without giving defendants an opportunity to be heard. Later, in like manner, it overruled defendants' Motion For Damges. Such transactions, *when considered together*, as connected incidents, constitute an arbitrary action and an abuse of discretion on the part of the three-judge District Court.

In addition to the foregoing suggestion, the suggestion is also made that the act of relegating state agencies and officers (petitioners here) to seventy-six (76) separate actions at law or in equity in many different forums in numerous States constitutes an abuse of judicial discretion in itself. It does not seem to comport with the principles of equity that a district court could "*retain jurisdiction*" for fifteen (15) months, and throughout said period of time restrain the collection of legally owing road-use license fees, which it required should be deposited with a trustee, and which it required to be protected from loss to the State by two injunction bonds in the aggregate amount of Thirty Thousand ($30,000.00) Dollars, and thereafter relegate defendant state officers and agencies to a multiplicity of actions in many forums in various States to collect said fees. Especially does the action of the Court seem not equitable in view of the fact that the fees now owing and unpaid are so owing and unpaid as a *direct result* of violations

by plaintiffs below of the temporary restraining order. The State, through its Public Service Commission or Attorney General, is entitled to have *restitution* of these license fees in the same Court which improvidently restrained collection thereof.

The Circuit Court of Appeals, without commenting upon the aforesaid pertinent fact, decided that the District Court did not abuse its discretion. If the District Court did so decide, suggestion is made that the Supreme Court should protect the defendants against the arbitrary transgression of their rights by the three-judge District Court, also against the error of the Circuit Court of Appeals.

Specification III.

A. Proper rule for trial of Motion for Damages. The majority opinion of the Circuit Court of Appeals holds that (R. 104):

> "the proper procedure in such a situation as here presented *requires* that the three-judge court, which has discharged its essential function of adjudicating upon constitutionality, *should*, upon presentation of facts by the parties, remit such ancillary litigation to the District Judge for proceedings 'to be taken independently of Section 266 of the Judicial Code, ... ' "
> (Emphasis supplied.)

The Circuit Court of Appeals announced the foregoing mandatory rule, and immediately disregarded it. The dissenting opinion holds that the foregoing rule of the majority opinion is a sound one for three-judge district courts which are confronted with an ancillary cause of action while they are considering an injunction matter under the provisions of Section 266 of the Judicial Code. The dissent is based upon conflict between the rule announced in the majority opinion and the action of the Circuit Court of Appeals in affirming dismissal of the Motion For Damages by the three-judge District Court.

It is the position of petitioners that if the Circuit Court of Appeals announced a correct rule of procedure, it erred in not following it in the case at hand.

Obviously, it is unimportant to petitioners whether their Motion For Damages, being essentially a request for *restitution* of the common carrier license fees withheld by plaintiffs

below, should be tried on the merits before the single district judge who granted the temporary restraining order and fixed its conditions or the specially constituted three-judge district court. They should have their day in court on the merits in either case. Suggestion is made that the Supreme Court should prescribe the proper rule to be followed under the present circumstances, and thereupon remand the Motion For Damages to the District Court for trial on the merits in accordance with said rule.

ARGUMENT

I.

A. Preliminary Suggestions.

In the **Summary of the Argument** an effort has been made to present a concise appreciation of the merits of this proceeding in certiorari in the Supreme Court. The points therein discussed may now be expanded, supported and strengthened by an application of the pertinent statutes and rules of petitioner Public Service Commission of the State of Missouri, also by a discussion of pertinent case law.

As a preliminary clarification, however, as to which of the three questions for decision *must necessarily be decided*, the following explanation is submitted, to-wit:

If this Court should decide that, in accordance with rules of equity or on purely legal grounds, (1) either the Public Service Commission or the Attorney General are proper parties to maintain the cause of action pleaded in the Motion For Damages, then it should further decide (2) whether or not dismissal of the Motion For Damages on the ground that the District Court exercised a judicial discretion, and thereby relegated defendants below (petitioners here) to seventy-six (76) separate causes of action in many forums in numerous States, constitutes an abuse of judicial discretion. It is obvious that, in order to settle the litigation in this proceeding, the Supreme Court should decide the second question presented if it should decide the first one favorably to the petitioners.

It is also obvious that, if the Supreme Court should decide both (1) and (2) favorably to petitioners, it should then *announce* (3) a clear rule of procedure for trial on the merits of the Motion For Damages, or other ancillary cause of action, in the District Court, i. e., whether, when an ancillary cause of action for *affirmative relief or for restitution* of something withheld by a temporary restraining order granted in a principal proceeding instituted under the provisions of Section 266 of the Judicial Code, such Cross-bill, secondary or incidental cause of action must be remanded by the statutory three-judge District Court to the single district judge who

granted the temporary restraining order and fixed its terms and conditions for proceedings thereon independently of the provisions of Section 266 of the Judicial Code.

B. Primary Question for Decision: Are petitioners (defendants below), or any of them, proper parties to maintain the Motion For Damages, as an ancillary cause of action in the District Court?

It is the conviction of petitioners that this was the primary question to be decided in both courts below. It is contended that the District Court erroneously decided it adversely to defendants. The Circuit Court of appeals erred in that it misinterpreted the decree of the District Court and therefore did not decide the question at all. The necessity of its decision is at the very threshold of a review of the opinion of the Circuit Court of Appeals. Concededly, if none of the petitioners (defendants below) are endowed with power or authority to maintain, on any grounds, the Motion For Damages in an action in the District Court, this proceeding in certiorari may be finally and completely determined by such a decision.

It is also the conviction of petitioners that the three-judge District Court clearly evidenced its decision concerning the right of the defendants to maintain the action, in the following language of paragraph 4 of the decree, as amended (R 67):

> ". . . and the court being in *serious* doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed . . ." (Emphasis supplied).

Thereafter, (R 83), speaking of the Motion For Damages, the specially constituted three-judge District Court said:

> "It appearing to the Court that the subject matter and relief prayed for in defendants' motion for damages, filed May 22, 1939, has heretofore been ruled and finally determined in this cause, the motion referred to is hereby overruled."

The Circuit Court of Appeals interpreted the aforesaid language as constituting a dismissal of the Motion For Dam-

ages on the ground that the District Court *was exercising a judicial discretion* to relegate defendants below (petitioners here) to seventy-six (76) separate causes of action in many forums in various States. It is not believed that the three judges composing the statutory District Court so intended. Its own plain language does not support the interpretation placed thereon by the Circuit Court of Appeals. It is suggested, therefore, that the District Court *did not exercise a judicial discretion* to relegate defendants below (petitioners here) to seventy-six separate actions at law or in equity, but that *it affirmatively decided* in its modified decree that it entertained such "*serious*" doubt as to the right of defendants below (petitioners here), or any of them, to maintain the cause of action pleaded in the Motion For Damages as to justify it in dismissing said motion. The deliberate adding of the word "*serious*" to the amended decree is significant. The Court was surely thinking of defendants in terms of proper parties to maintain the action. It was not thinking of its own discretion to proceed.

Moreover, one of the judges in the instant three-judge court sat as one of the three judges in the case of **Eichholz v. Hargus,** et al., 23 Fed. Supp. 587. There l. c. 599-600, in a dissenting opinion he clearly showed the basis of the "serious doubt" entertained by himself, at least, as to the right of the Public Service Commission to maintain the cause of action stated in the Motion For Damages. He based his serious doubt in that case on two reasons, namely, (1) that the Counterclaim in the Eichholz case was not one comporting with the requirements of Equity Rule 30, and (2) that the State itself or the State Treasurer, and not the Public Service Commission should maintain the cause of action for the license fees owing. These ideas were not in accord with those of other two judges who sat in the Eichholz case.

The Rules of Civil Procedure for the District Courts of the United States became effective September 1, 1938. The Motion For Damages was not filed until May 22, 1939. Therefore, it was not subject to scrutiny under Equity Rule 30.

Moreover, the criticism of the dissenting judge in the Eichholz case in connection with Equity Rule 30 is not equivalent to saying that he believed the Court in that case should exercise its judicial discretion and relegate the defendants in that case to an action at law against the plaintiff.

Equity Rule 30 pertained to the nature and essence of a proposed counterclaim. The exercise of judicial discretion to relegate parties to another court is a different thing entirely.

Since the Motion For Damages, filed on May 22, 1939, was not subject to scrutiny under Equity Rule 30, it may be inferred that the reason of one of the judges for overruling it was based solely upon his second criticism of the counterclaim in the Eichholz case, namely, that the State itself or the State Treasurer and not the Public Service Commission is the right party to maintain the cause of action pleaded in the Motion For Damages.

Therefore, it is the conviction of petitioners that the secondly named objection of the dissenting judge in the Eichholz case to the counterclaim in that case is the same objection he entertained against the instant Motion For Damages. It is suggested therefore that the other two judges sitting in this case below agreed with him. If so, the Motion For Damages was not overruled on the basis of an exercise of judicial discretion to relegate defendants to seventy-six (76) separate actions instead of allowing them to proceed to try the Motion For Damages in the District Court where it originated either before the three judges thereof or before the single judge who granted the temporary restraining order. It was dismissed on the point that the District Court believed neither the Public Service Commission nor any of defendants were the right parties to maintain such an action.

In any event, it seems necessary that the Supreme Court should decide the question. If it should be assumed that the District Court decided the question in favor of defendants below (petitioners here), the Supreme Court would have authority in this proceeding to affirm or reverse such decision.

C. Equity alone invests petitioners with right to maintain Motion For Damages.

As stated in the summary of the argument, it is the position of petitioners that *equity alone* invests the Public Service Commission, as well as the Attorney General, with sufficient *right* to maintain the cause of action pleaded in the Motion For Damages. Whether it should be maintained before the single judge who granted the temporary restraining order and fixed its conditions or before the statutory three-judge court itself is of little importance. The State, obviously,

is entitled to the fees in question. They have been withheld because of the temporary restraining order, which was flagrantly violated by all of the plaintiffs below as to the payment of license fees for operations into Missouri by those plaintiffs who terminated some or all of their westbound interstate traffic in St. Louis, Missouri, during the period of the temporary restraining order. Approximately thirty of the plaintiffs below terminated all of their westbound interstate traffic operations in St. Louis, Missouri, and the remainder of them terminated some of their westbound interstate traffic operations in St. Louis, Missouri. For these 10 or 20-mile distances into Missouri, none of the seventy-six (76) plaintiffs made application to the Public Service Commission for annual licenses at the rate of one-third or one-half the regular annual license fee. None of them purchased "travel orders" for these operations. Hence, none of them deposited with the trustee, as required by the terms of the temporary restraining order, the license fees for the 10 and 20-mile distances as provided by Section 5272 of the law in question.

Under the rules of equity, it is suggested that the Public Service Commission, which has always at the time of licensing commercial vehicles used in transporting property for hire collected the license fees, whether consisting of annual license fees or so-called emergency fees on vehicles not regularly operated into the State, is entitled to maintain on behalf of the State of Missouri, the real party in interest, the cause of action stated in the Motion For Damages. So is the Attorney General. So are the other two defendants named in the injunction suit.

Indeed, plaintiffs below instituted their injunction suit on the theory that defendants below (petitioners here) were the right parties to restrain and enjoin in order to protect themselves against arrests for collection of the statutory license fees in question. They did not join the State Treasurer as a defendant. Evidently, they did not believe that he is a right party to institute arrests against themselves for collection of the license fees in question. Will equity permit them to select the defendants whom they represent to the equity court as the right parties to restrain to prevent collection of the allegedly unconstitutional license fees and thereafter hear them to say that those defendants are not the right parties to maintain a cause of action, incidental

to their injunction suit, for collection on behalf of the State the license fees in question, which fees they would have been forced to pay under penalty of arrests except for the effectiveness of the Court's temporary restraining order? The District Court has resolved the question in favor of plaintiffs. Equity abhors such a conclusion.

Moreover, by means of the stipulation (R 20) which became a part of the temporary restraining order, the plaintiffs voluntarily recognized the Public Service Commission as the right party to whom to pay the license fees in question. They said they would deposit the fees owing by them to the Commission, for the use of the State, with the trustee. Twenty-seven of plaintiffs deposited $104,015.43 with the trustee. On stipulation (R 77-78) they released said amount to the Public Service Commission on May 17, 1939, in payment for annual licenses and travel orders which had been furnished during the pendency of the litigation.

Surely, therefore, defendants below (petitioners here) are the right parties to maintain as an incident to the main proceeding in equity the Motion For Damages, and thereby preserve the equitable rights of the State of Missouri, *whose agents they are.* Said agents, one or more of them, have at least an equitable right to maintain the Motion For Damages for their principal, the State of Missouri.

Finally, plaintiffs below by their General Denial (R 40) put in issue the cause of action pleaded by defendants for collection of license fees. They did not attack the right of the defendants to maintain such cause of action. The dismissal thereof was a purely gratuitous, erroneous action of the three-judge district court.

A certain Supplemental Statement (R 75), which became a part of the record at the time of the direct appeal on the Counterclaim to the Supreme Court, contains certain statements calculated to create the impression that there was an understanding between the parties that the provisions of the stipulation should not be strictly observed. Petitioners deny that there was anything said or done by defendants, or any of them, justifying plaintiffs' placing any self-serving construction on said stipulation. On the contrary, petitioners expected that the Stipulation of Parties (R 20) would be completely and equitably fulfilled by all parties thereto during the period of time the temporary restraining order would be

in effect. Said stipulation having been incorporated by consent of the parties into the Temporary Restraining Order, it was the duty of all parties to obey it. The record clearly discloses that all seventy-six (76) of the plaintiffs violated that stipulation within the City of St. Louis where at that time the enforcement problem was well known by plaintiffs to be most difficult.

D. Missouri Statute authorizes Public Service Commission to collect license fees in question.

Section 5267-(a) of the Missouri Bus and Truck Law, Laws of Missouri, 1931, provides:

> "*Power and Authority of Public Service Commission.* The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license, supervise, and regulate every motor carrier in this state . . . . ."

Imposition upon the Commission of the duty to license necessarily implies the duty to collect the license fee. The Court should have no difficulty in deciding that the administrative agency committed with the duty of issuing annual and temporary licenses was intended by the General Assembly also to be the state agency for collection of the license fees. Any other interpretation of the statute convicts the General Assembly of blundering. The Court will credit it with having intended to enact a practical, workable law.

Moreover, Section 5267-(b) provides:

> "The Public Service Commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined . . . . ."

It should be emphasized that Section 5267 is a section expressly designated as "*Power and Authority of Public Service Commission*". Said section gives the Commission **"power"** to license motor carriers. It gives the Commission **"authority"** to license motor carriers. It provides that it shall be the **"duty"** of the Commission to license motor carriers. It is stated again that the **"power and authority and . . . . duty"** of the Commission to license motor carriers implies **"power**

and authority and . . . . . duty" to collect all license fees imposed upon motor carriers.

Section 5268-(b), among other things, provides:

> ". . . that the Public Service Commission may issue temporary permits to interstate carriers without such hearing and notice for occasional trips, not exceeding one in any calendar month. Such temporary permits shall be issued *only upon the payment of such fees as may be designated by the Public Service Commission* . . . . ." (Emphasis supplied).

Section 5268-(b) further provides:

> "Such ports of entry or exit *may be established by the Commission* as in its judgment may be necessary for the proper administration of this act. In the event of the establishment of any port or ports of entry or exit the expense of the establishment and maintenance of each such port *shall be paid out of the receipts at each port* derived from the sale of temporary permits to interstate carriers." (Emphasis supplied).

Respondents may contend that the Treasurer alone is the one authorized to receive and accept payment.

They refer to Section 5272. Said section is not one of **"powers"** of the Commission. It certainly is not a section defining the **"powers"** of the State Treasurer. It simply states what administrative practice the Commission shall follow in collecting "*the annual license fee*" from motor carriers. That the State Treasurer is the mere payee or **"receiver"** of such fees is evidenced toward the end of Section 5272-(a) wherein it is provided that,

> "The Commission, upon issuance of a license for any vehicle, as defined in this Act, shall notify the State Treasurer who shall receive the license fee for such vehicle . . . . . ."

Obviously, the State Treasurer is wholly uninformed concerning the matters pertaining to fees in the law in question. The Commission must **"notify"** him. Thereupon, he **"shall receive the license fee".**

Section 5272-(a) provides in part as follows:

"In case of emergency or usual temporary demand for transportation, the license fee for additional motor vehicle for limited periods *shall be fixed by the Commission* in such reasonable amount as may be prescribed by general or temporary order."

Section 5272-(a), therefore, expressly says that the emergency or travel order fees shall be **"fixed by the Commission."** The Commission not only fixes the travel order fees, but it prints the travel order forms and sells them, and collects the travel order fees.

Indeed, plaintiffs (R. 78), out of a total of $104,015.43 remitted $81,805.00 to the Commission in the form of emergency or travel order fees.

It is therefore contended that if Section 5272-(a) confers "*power*" upon the State Treasurer to collect **"the annual license fee"**, it confers "*power*" upon the Commission to collect **"the license fee"** for emergency travel. **Appellants contend that the Commission has the power, express or implied, to collect all fees.** The State Treasurer, on the other hand, is authorized to **"receive"** license fees from the Commission.

As a matter of fact, by an intervening motion (R. 23), approximately twenty (20) of the plaintiffs submitted to the jurisdiction of the District Court upon the proposition that (R. 24),

". . . . . they are ready and willing to enter into such reasonable stipulations as may be agreed upon with reference to making of daily reports on *emergency travel orders* to the end that proper records may be maintained."

The Court (R. 26) sustained their motion to intervene on the ground that they would file an injunction bond in the amount of Twenty Thousand Dollars ($20,000).

It is true that Section 5272-(a) provides as follows:

"In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 5265 of this act, shall, at the time of the issuance of a

certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1, and January 15, of each calendar year, pay to the state treasurer of the state of Missouri the annual license fee, as set out in this act, for the maintenance and repair of the public highways; . . . . . "

But it is the contention of defendants that the language aforesaid merely indicates that the annual license fees mentioned should, upon remittance to the Public Service Commission, be deposited in the state treasury. The treasurer is the mere payee who must receive State moneys from various State officers or departments authorized to collect State moneys. It is admitted that the Commission requires, as an administrative practice, that all checks for fees shall be made payable to the order of the State Treasurer. All cash received for fees is safely kept by the Commission and promptly deposited in the state treasury.

Section 5280 provides as follows:

"It is hereby declared that the legislation herein contained is enacted for the sole purpose of promoting and conserving the interests and convenience of the public; and that no right, privilege, or permit granted or obtained under or by virtue of this act shall ever be construed as a vested right, privilege, or permit; and the general assembly retains full legislative power over, concerning and pertaining to the subject or subjects legislated upon in this act and the power and right to alter, amend or repeal this act at its pleasure."

Without further discussion of them, it is submitted that the foregoing sections of the law in question show a legislative intent to vest in the Public Service Commission authority to maintain actions at law or in equity for the purpose of collecting on behalf of the State of Missouri the statutory fees mentioned in Section 5272 aforesaid.

E. Public Service Commission Rules reveal it has always collected license fees.

Public Service Commission rules (R. 90-93) clearly reveal that the Commission itself has always required motor vehicle

operators, subject to the aforesaid Missouri Bus and Truck Law, to remit to it all types of fees, including (1) fees for annual licenses, (2) fees for temporary or occasional permits, or (3) fees for emergency or usual temporary demand for transportation.

Rule No. 8 provides (R. 90) that,

> "Each interstate carrier . . . . . shall pay the fees in advance for said **temporary permit** as hereinafter set out:
>
> | | |
> |---|---|
> | More than 1 ½ tons and not more than 4 tons... | $2.00 |
> | More than 4 tons and not more than 7 tons.... | 4.00 |
> | More than 7 tons and not more than 9 tons.... | 7.00 |
> | More than 9 tons..... | 9.00" |

Similar provision is made for **temporary fees** for passenger-carrying vehicles.

Rule No. 13, relating to ports of entry, provides (R. 91) that,

> "Temporary interstate permits may be issued at the ports of entry which have been duly and legally designated by the Commission. The holder of such interstate permit card may enter this state through the port of entry after securing said temporary interstate permit card from the keeper of said port of entry . . . ."

No provision is made in the statute, or the rule pertaining to ports of entry, that a representative of the State Treasurer shall be present to collect fees from interstate operators. The statute and the rules clearly show that the Public Service Commission shall fix and collect such fees.

In like manner Rule No. 14-B, pertaining to vehicles using travel orders, provides, as also does the statute, that the Commission shall not only fix the **travel order fees,** but shall collect them from the carriers from time to time.

As an illustration, it is provided in such latter rule (R. 92) that,

> "The Commission will issue such extra travel order forms in triplicate to any certificated operator in books of 5,

10, or 25, or at the request of the operator one such travel order may be purchased.

. . . . . .

The operator will be required to purchase and pay in advance for such extra travel order or orders at the time of issue by the Commission. The fee to be paid for said emergency travel order or orders shall be as follows: . . . . . ."

Furthermore, Rule No. 15-B, also pertaining to issuance and use of travel orders, provides in part (R. 93) as follows:

"The Commission will have on hand for the purchase by the operator desiring travel orders blank books containing 5, 10, and 25 emergency travel orders.

* * * * * *

Any operator may purchase one travel order upon the payment of the required fee as set out in that rule."

Therefore, both the statute and the rules promulgated thereunder clearly show that the Public Service Commission is a proper party to maintain an action to enforce payment of delinquent fees aforesaid.

F. Implied powers of Commission.

Finally, attention of the Court may in this brief be properly directed to additional powers of the Commission over motor carriers which are engrafted upon the Missouri Bus and Truck Act.

Section 5267-(c) of the latter Act provides:

"All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to all such motor carriers, except as herein otherwise specifically provided."

Upon inspection of the original Public Service Commission Act, R. S. Mo. 1929, the following sections are of interest:

Section 5123,

"A public service commission is hereby created . . . . with and possessed of the powers and duties in this

chapter specified, and also all powers necessary or proper to enable it to carry out fully and effectually *all the purposes* of *this chapter.*"

Section 5127,

"It shall be the duty of the general counsel . . . . . to represent and appear for the commission in all actions and proceedings involving any question under this or *any other law* . . . . . ."

Section 5131,

"The Commission may sue and be sued in its official name."

Section 5163,

"The Commission shall have the **general supervision of all common carriers** . . . . . and shall examine the same . . . with respect to their compliance *with all the provisions of law,* orders and decisions of the commission and charter requirements. . . . . ."

Section 5166,

"The Commission may, of its own motion, investigate or make inquiry, in a manner to be determined by it, as to any act or thing to be done or omitted to be done by **any common carrier** . . . *in violation of any provision of law* or in violation of any order or decision of the commission.

Section 5229,

"An action . . . . . to enforce the powers of the commission under this *or any other law* may be brought in any circuit court in this state **in the name of the state of Missouri** and shall be commenced and prosecuted to final judgment by the general counsel to the commission . . . . . ."

Section 5230,

"Complaint may be made by the commission . . . . . setting forth any act . . . . . in violation, or claimed to be in violation, *of any provision of law.* . . . . ."

Section 5236,

"All actions or proceedings under this *or any other chapter,* . . . . . to which the commission or the state may be parties, and in which any question arises under this *or any other chapter,* shall be preferred over all other civil causes . . . . . ."

It is suggested that the above additional language of various sections of the Missouri Public Service Commission Act indicates a legislative intent to empower the Commission to do anything reasonably necessary to carry into effect and to enforce all provisions of law applicable to common carrier motor vehicles, whether contained in the Missouri Bus and Truck Law or the original Public Service Commission Law.

From the foregoing statements of equitable principles, applicable statutes and administrative rules the petitioners submit that the Public Service Commission is a proper party to maintain the Motion for Damages for collection of the fees in question, either in its own name or in the name of the State of Missouri or the State Treasurer of the State of Missouri. Indeed, by statutory provision and the long established rules of the Commission, the Commission has been *recognized* as the proper party to collect the fees, either in its own name or as an agent of the State or of the State Treasurer. Respondents in their Bill in Equity conceded that, in order to have the protection desired, they should restrain the Public Service Commission from proceeding to collect the fees which were alleged by them to be unconstitutional. They did not name the State Treasurer as a defendant. Inasmuch as they owe such fees, and pledged they would pay them, the rules of equity should operate to compel them to fulfill their legal and moral duty.

C. Eichholz case holds Commission proper party to maintain action for fees.

In the case of **Eichholz vs. Hargus, et al., 23 Fed. Supp. 587,** the three-judge District Court, Western District of Missouri, Central Division, on March 24, 1938, made the following conclusion of law (l. c. 594):

> "IV. That the plaintiff is indebted to the State of Missouri for license fees and charges accumulated since the granting of a temporary restraining order in this case, and the state is entitled to judgement therefor."

In the Eichholz case the three-judge court had under consideration a counterclaim filed by the Public Service Commission of the State of Missouri. There Eichholz was resisting, also under the provisions of Section 266 of the Judicial Code, the revocation by the Commission of his authority to operate. In the instant case, the Brashear plaintiffs were directly resisting the authorty of the Commission and other defendants to compel them to pay the fees in question, on the grounds that said fees were unreasonable and therefore unconstitutional. Therefore, the facts in the Brashear case are stronger in favor of upholding the right of the Public Service Commission to recover the delinquent fees than they were in the Eichholz case.

In the Eichholz case the three-judge District Court said in part as follows:

> "While the injunction granted by this court prohibited the defendant Public Service Commission from revoking and cancelling plaintiff's permit as an interstate carrier, such injunction in nowise relieved the plaintiff of the obligation to pay statutory or prescribed license fees. No reason appears why such payments should not have been made. On the contrary, **there is every reason why the plaintiff in a proceeding in equity should not meet all of the reasonable exactions of the state as condition precedent to the operations carried on by him.**
>
> * * * * * * *
>
> No objection having been made to the filing of the counterclaim, this court will not interpose one under the circum-

stances of the case. The question having been presented, it should be considered by us. (Emphasis supplied.)

* * * * * *

The parties will be given thirty days from the filing of this opinion to agree upon the amount of the accumulated fees due under the counterclaim. If such agreement is not made within that time or within an extension for that purpose granted within that time, a decree will be entered dissolving the temporary injunction, refusing the permanent injunction and appointing a special master to determine the amount of fees payable under the counterclaim.

If such agreement as to fees is reached within the time above allowed, a decree will be entered dissolving the temporary injunction, refusing the permanent injunction, dismissing the bill upon its merits and awarding recovery upon the counterclaim for the amount so agreed upon."

The record of the three-judge District Court in the **Eichholz case** reveals that the parties failed to agree upon the amount of fees payable under the counterclaim, and that the three-judge Court appointed a special master. After hearings, the special master submitted his report and the three-judge Court rendered judgment,

". . . . that defendant, Missouri Public Service Commission, have and recover for the State of Missouri from the plaintiff, on the counterclaim of the defendant, the sum of $23,314.50, together with its costs."

A direct appeal was taken by Eichholz to the Supreme Court of the United States. **In Frank Eichholz vs. Public Service Commission, 306 U. S. 268,** the Supreme Court disposed of the appeal, so far as the counterclaim was concerned, in the following statement:

"By a supplementary answer, the Public Service Commission pleaded a counterclaim for fees alleged to be due to the State for the use of its highways since the granting of the restraining order which was issued on the institution of the suit. *The District Court adjudged the defendants entitled to recover on the counterclaim and appointed a special master to take the necessary accounting. As the decree is*

not a final one so far as the counterclaim is concerned, the appellees move to dismiss the appeal. The motion is denied. The decree denied a permanent injunction and this Court has jurisdiction of a direct appeal from that part of the decree by virtue of the express provision of the statute." (Emphasis supplied.)

In other words, the Supreme Court in the Eichholz case upheld the jurisdiction of the specially constituted three-judge District Court to allow the Public Service Commission to maintain an action to collect fees like those in question from Eichholz. If the Supreme Court, upon having had called to its attention the fact that the three-judge District Court took jurisdiction of the counterclaim and allowed the Public Service Commission to prosecute it to a judgment against Eichholz, should have decided that the three-judge District Court was without jurisdiction to permit the Public Service Commission to prosecute the counterclaim, *it was its duty* to have reversed and remanded the action of the three-judge District Court on the counterclaim, on the ground that the three-judge District Court had no jurisdiction thereof. It did not do that.

H. Attorney General also may maintain action to collect fees.

Although petitioners stand primarily upon the proposition that the Public Service Commission is the proper party to maintain an action to collect the fees in question, it is also contended that the Attorney General, the chief counsel of the State, one of the defendants named in the Bill of Equity, is a proper party to maintain an action in the name of the State for the collection of the delinquent fees herein mentioned.

Section 11276, Volume I, Missouri Statutes Annotated, page 586, provides as follows:

"The Attorney General shall institute, in the name and on behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear

and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved."

State v. Creamery Co., 211 Mo. App. 116, 245 S. W. 361; State ex rel. v. Williams, 221 Mo. 227, 260, 120 S. W. 740; State ex rel. v. Bronson, 115 Mo. 271, 21 S. W. 1125.

II.

A. Preliminary discussion.

If the Court has decided in I that one or more of defendants below (petitioners here) are entitled to maintain the Motion For Damages in the District Court, it is necessary that it should decide the question of abuse of discretion.

Therefore, the same principles advanced in I-C to support the contention there, (namely, that upon the basis of equitable principles alone one or all of defendants below should be permitted to maintain in an ancillary proceeding in the District Court, either before the single judge who granted the temporary restraining order and fixed its terms and conditions or before the specially constituted three-judge court, the cause of action pleaded in the Motion For Damages to recover road-use license fees which plaintiffs below would have been forced to pay under penalty of arrests except for the effectiveness of the temporary restraining order of the equity court), should be considered to support the contention that the three-judge District Court abused its discretion by overruling defendants' Motion For Damages.

B. Secondary question for decision: Did the specially constituted, statutory three-judge District Court abuse its discretion by overruling defendants' Motion For Damages?

The very fact that an equity court allowed seventy-six (76) interstate carriers, plaintiffs below, to have the benefit of its powers to restrain the state agency entrusted with administration of the state act in question for a period of fifteen months from forcing payment of statutory state license moneys, constituting remuneration for actual use of the public streets and highways, imposes upon the same equity court the duty to do equity to the restrained party or parties. In the instant case equity imposes upon the district court the duty to allow the Public Service Commission and the Attorney General,

either or both, to proceed to trial on the Motion For Damages, which includes a claim for the statutory license fees in question and proper expenditures of defendants below (petitioners here) for preparing and presenting their respective defenses to the injunction suit.

It was a plain abuse of judicial discretion to ~~regulate~~ relegate the defendants below (petitioners here) to the immense burden of filing and prosecuting seventy-six (76) different causes of actions, in law or in equity, in many different forums in numerous states, **IF** the specially constituted district court based its dismissal of the Motion For Damages on the ground of judicial discretion so to relegate defendants to such multiplicity of suits in many forums in numerous states. The fact that plaintiffs below flagrantly violated the terms of the temporary restraining order by failure and refusal to deposit license fees for the shorter distances involved for fifteen months while they were protected against arrests seems to impute to the specially constituted three-judge district court a high degree of abuse of judicial discretion, **IF** the judges thereof consciously considered the situatior before them, and **IF** the dismissal of the Motion For Damages is actually based on the ground of judicial discretion to relegate defendants to the multiplicity of suits already described.

Now is a proper time to emphasize that petitioners do not believe that the specially constituted district court based its dismissal of the Motion For Damages on the grounds of judicial discretion to relegate defendants below to a multiplicity of actions. They believe that the dismissal of their Motion For Damages was based upon the "*serious doubt*" which the district court entertained "*as to the right of the defendants to maintain*" the cause of action pleaded, first, in the Counterclaim and, second, and thereafter, in the Motion For Damages.

If the District Court based its dismissal upon the grounds that none of the defendants below (petitioners here) are the right party or parties to maintain the Motion For Damages, *it erred.*

Such error has been fully discussed under question I. But **IF** the District Court based its dismissal of the Motion For Damages on the aforesaid ground of judicial discretion to relegate defendants below (petitioners here) to a multiplicity of suits, *then it abused its judicial discretion.*

C. Discussion of Applicable Decisions.

(1) **United Motors Service, Inc. v. Tropic-Aire, Inc.**, 57 Fed. (2d) 479, has been cited by the Circuit Court of Appeals in support of the rule which is said to be in effect in the Eighth Circuit. In another particular the dissenting judge has already pointed out the inapplicability of that opinion to the instant case.

On the question of abuse of discretion the Tropic-Aire opinion is palpably not applicable in the instant case. In the Tropic-Aire case only one action at law in a single forum against a single defendant was involved. It is comprehensible that in such a case there would be no injury done to relegate one to a single action at law against a single defendant, and perhaps in the same forum as the equity suit. But it is incomprehensible that the District Court did not abuse its discretion when it relegated numerous state officers and state departments, defendants below, to seventy-six (76) actions at law in many different forums in many different states.

It is suggested that a rule relegating one defendant to a single action at law in a single forum, which does not constitute an abuse of discretion, is wholly inapplicable to a situation where numerous state officers, as defendants, seeking recovery of state license fees, are relegated to seventy-six (76) actions at law in many different forums in many different States. The Circuit Court has not followed the underlying principle of the rule pertaining to a proper exercise of judicial discretion. It has undertaken to establish a new rule.

Whether the action of the Circuit Court of Appeals should be regarded as a perversion of the existing rule or the establishment of a new one it has announced a dangerous precedent for a court of the United States. It practically guarantees Federal immunity to far-flung interstate enterprises who may collectively contrive to violate state laws. They can come in veritable swarms to violate state taxing or other laws. Upon exertion of efforts by inadequately staffed state administrative agencies such swarms of interstate law violators can bring injunction proceedings in a Federal district court in the Eighth Circuit, and, after tax collections have been restrained for more than a year, they can scurry back to their various foreign residences entirely without the reach of the arm of justice, an arm of justice rendered more feeble by

operation of an improvident rule in the Courts of the United States.

Inasmuch as the opinion does not discuss the great dissimilarity between the instant case and the Tropic-Aire case, it is believed that the Circuit Court overlooked that a rule governing the particular ancillary matter in the Tropic-Aire case could not extend to the state officers in the ancillary matter in the instant case involving a claim against seventy-six (76) plaintiffs with residences in many different forums in many different states. There might just as well have been 500 of these interstate trucker plaintiffs. If that number had been involved, would the Circuit Court still say the rule in the Tropic-Aire case would hold good concerning a similar ancillary matter? Evidently, the Circuit Court overlooked the difference between slight inconvenience in the Tropic-Aire case, on the one hand, and a great, insurmountable, injurious burden, on the other hand. The insurmountable burden arbitrarily imposed upon the state officers by the three-judge court gives the color of complete triumph to the seventy-six (76) law violating plaintiffs. Unless the action of the three-judge court is set aside and the State of Missouri is given an opportunity to have damages and costs ascertained and assessed in this case, the plaintiffs will have used the Federal Court to defraud the State of Missouri of thousands of dollars and the Court will, by its indifference and abuse of discretion, have contributed to their unjustified financial victory.

Even in the case of **United Motor Service v. Tropic-Aire,** 57 F. (2d) 479, relied on as authority in the Eighth Circuit for affirming the order dismissing the ancillary cause of action, the Court clearly indicated that it would be improper to relegate a defendant to an action at law on the injunction bond if **affirmative relief** is asked in defendant's pleading. In that case no affirmative relief was asked in defendant's pleading; hence there was no abuse of discretion by refusing to assess damages under the injunction bond in the equity suit proper. In the aforeasid case the Court said (page 485):

> "Many courts of original jurisdiction have laid down rules with reference to this matter and have regarded it as the **better practice** for the court in the equity suit to determine the damages. For instance, in Owl Creek Coal Co. v. Big Horn Collieries Co. (D. C.), 36 F. (2d) 485, the

court reviews many of the federal decisions upon the subject and states that defendant may in an ancillary proceeding summarily enforce a bond against the surety, and that the **defendant ordinarily will not be permitted to his remedy at law.** Same doctrine, Lea v. Deakin (C. C.), 13 F. 514." (Emphasis supplied.)

(2) The majority opinion, on the question of abuse of discretion, is in conflict with the **Eichholz case, 23 Fed. Supp. 587,** which was tried in the District Court, Western District of Missouri. It is in conflict with other cases in the same and other circuits. In the Eichholz case, a specially constituted three-judge district court, proceeding under Section 266, took jurisdiction of a counterclaim for statutory license fees under Section 5272 of the Missouri Bus and Truck Law and rendered a final money judgment in favor of the Public Service Commission. Only one plaintiff was involved. Here there are seventy-six (76) plaintiffs.

(3) If the action of the three-judge Court in dismissing the Motion for Damages shall be regarded as being based upon an exercise of judicial discretion, it disposed of the matter in a manner in conflict with **the general rule** in effect in all circuits concerning summary action against sureties on injunction bonds. It is in conflict also with the rule in the Supreme Court, as announced in **Russell v. Farley,** 105 U. S. 433, as follows (l. c. 445).

"Other cases are referred to by the counsel of the appellants to sustain their position; but upon a careful examination we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, **to have the damages assessed under its own direction.** This is the ordinary course in the Court of Chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, **and thus do complete justice, and put an end to further litigation.**"

(4) In **Inland Steel Company v. United States,** 306 U. S. 153, 83 L. Ed. **557, 560,** this Court, speaking of a specially constituted three-judge court, quoted approvingly from Russell v. Farley.

In other words, the Courts, acting as ordinarily constituted one-judge courts, or as specially constituted three-judge courts, have power to exercise a wise judicial discretion. Usually it is fitting that the Court should **"retain jurisdiction"** to do complete justice.

(5) In **Owl Creek Coal Co. v. Big Horn Collieries 36 F.** (2d) 485, (Tenth Circuit), Russell v. Farley, supra, is also quoted at length. Cases from several other circuits are also quoted, showing that Russell v. Farley, supra, is uniformly followed in all the circuits. The Court said:

> "From the foregoing it would appear that **all the federal courts, District, Circuit, and Appellate,** in the cases at least which are cited by counsel, *have been unanimous in adopting the suggestion laid down by the Supreme Court in Russell v. Farley.*
>
> I see no good reason why the rule should not be adopted here, not only upon the reasoning which would seem to sustain it and which is not necessary to reiterate here, but also upon the ground of expediency and order, *with the object in view of seasonably terminating all litigation possible in the same unit.*
>
> For the reasons stated, the motion to strike the second counterclaim will be overruled and denied, reserving to the litigants, respectively, their several exceptions to the adverse rulings herein indicated." (Emphasis supplied.)

Summarizing, if the action of the district court of three judges was that of a specially constituted three-judge court under Section 266 of the Judicial Code, it was without authority to dismiss the Motion for Damages if such specially constituted courts **must remit** to the single judge the ancillary matter; and, if it was the action of an ordinarily constituted one-judge court, it acted in conflict with the uniform rule in all circuits permitting the court, in its discretion, to render judg-

ment for damages on the injunction bond in the main equity proceeding, **and favoring such action except in rare cases.**

It is believed that there is no reported case showing a dismissal of a defense pleading for *affirmative relief*, and surely no case of record where several state officers and state departments are relegated to a burdensome number of separate actions at law in many different forums in different states to collect or seek restitution of statutory license fees which the seventy-six (76) plaintiffs were obligated to deposit with the trustee under the terms of the temporary restraining order, and which restraining order plaintiffs violated for fifteen months and thereby breached the express conditions of their injunction bonds.

(6) In **Camp v. Boyd,** 229 U. S. 530, l. c. 551-552, the Court said:

> "A court of equity ought to do justice completely, and not by halves. (Citing cases.)
>
> One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority."

(7) Moreover, this Court, in **Pease v. Rathbun-Jones Engineering Company**, 243 U. S. 273, l. c. 279, said:

> "The objection that a court of equity has no jurisdiction because there is an adequate remedy at law on the bond is not well taken. A court of equity, having jurisdiction of the principal case, *will completely dispose of its incidents and put an end to further litigation.* Applying this principle equity courts, upon the dissolution of an injunction, commonly render a summary decree on injunction bonds." (Emphasis supplied.)

The specially constituted three-judge court in the Eichholz case, supra, applied the above rule of the Pease case.

D. Equity will do complete justice.

There is another line of cases which hold that a court of equity, even specially constituted three-judge courts, will retain jurisdiction to do complete justice.

(1) In **Sterling v. Constantin,** 287 U. S. 378, 393, 394, 77 L. Ed. 375, 383, this Court said.

> "The jurisdiction of the District Court so constituted (three judges), and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. Siler v. Louisville & N. R. Co., 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 S. Ct. 451; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 303, 58 L. ed. 229, 238, 34 S. Ct. 48; Davis v. Wallace, 257 U. S. 478, 482, 66 L. ed. 325, 328, 42 S. Ct. 164; W. T. Waggoner Estate v. Wichita County, 273 U. S. 113, 116, 71 L. ed. 566, 568, 47 S. Ct. 271."

(2) In **Railroad Commission of the State of California v. Pacific Gas & Electric Company,** 302 U. S. 388, 391, 82 L. ed. 319, 321, the Court said, in another Section 266 case:

> "Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal. Siler v. Louisville & N. R. Co., 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 S. Ct. 451; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 303, 58 L. ed. 229, 238, 34 S. Ct. 48; United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 307, 73 L. ed. 390, 395, 49 S. Ct. 150."

(3) Also see **Sovereign Camp, W. O. W. v. Murphy,** 17 Fed. Supp. 651, where a three-judge court in the Eighth Circuit, acting under Section 266, followed the above principle and cited the above cases.

In three cases involving **counterclaims** this Court has said that equity courts will do complete justice:

(4) **Leman v. Krentler-Arnold Hinge Last Company,** 284 U. S. 448, 451, 76 L. ed. 389, 393;

(5) **Young Company v. McNeal-Edwards Company,** 283 U. S. 398, 400, 75 L. ed. 1140, 1141-1142;

(6) **Chicago & Northwestern Railway Company v. Lindell,** 281 U. S. 14, 17, 74 L. ed. 670, 672.

In the last cited case, the Court said:

"The adjustment of defendant's demand by counterclaim in plaintiff's action rather than by independent suit is favored and encouraged by the law. That practice serves to avoid circuity of action, inconvenience, expense, consumption of the court's time and injustice. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 615, 616, 38 L. ed. 565, 571, 572, 14 Sup. Ct. Rep. 710; Florida R. Co. v. Smith, 21 Wall. 255, 261, 22 L. ed. 513, 514; Partridge v. Phoenix Mut. L. Ins. Co., 15 Wall. 573, 579, 21 L. ed. 229, 230. In the case last mentioned, the court, speaking through Mr. Justice Miller, said (p. 580):

> '*It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal set-offs and counterclaims to be interposed and tried in the same suit and in the same form*'." (Italics supplied.).

E. Abuse of judicial discretion to disallow expenses of defense (R. 95).

In its opinion the Court has stated (R. 100):

"The motion was limited by its terms to the fees and taxes claimed to have accrued against the numerous truckers . . . . . ."

The motion (R. 79) is not limited by its terms to the "fees and taxes" claimed to have accrued against the numerous truckers. The motion includes the words "damages" and "costs", which are used in accordance with the proper and broader meaning of each. Surely, as intended by the new liberal rules of civil procedure, this Court will accord to the pleading in question,

if it contains substantial language, such reasonable meaning as the drafters of the pleading contend for it (R. 84, 85; 124, 129 original). It is obvious that it would have been a clear oversight of substantial rights of defendants if their counsel had prepared a motion for damages in an equity matter without including therein a request for recovery in damages of substantial expenses incurred in their respective defenses. The word "damages" is one of broad meaning. The word "costs", obviously, did not mean court costs.

III.

A. Was it not the Duty of the Specially Constituted three-judge District Court, upon consideration of the fact that it found the issues on the injunction matter in favor of the defendants, to remand the Motion For Damages to the single judge, who granted the temporary restraining order and fixed its terms and conditions, for proceedings to be taken thereon independently of the provisions of Section 266 of the Judicial Code?

Argument of this question has been adequately presented in the Summary of the Argument. The following suggestions and explanations, however, seem appropriate.

If the Supreme Court should decide that any of defendants below are the right parties to maintain the Motion For Damages and that, having such right of action, it would be an abuse of judicial discretion to relegate them to seventy-six (76) separate causes of action in many different forums in various states, then it is unimportant to petitioners whether the Supreme Court shall remand the Motion For Damages to the District Court to be tried on the merits before the single judge who issued the temporary restraining order or before the specially constituted three-judge District Court itself. Petitioners would have their day in Court in either event.

In two cases taken to the Supreme Court recently in which the Public Service Commission was a party, namely,

1. Public Service Commission v. Brashear, 306 U. S. 204.
2. Columbia Terminals, v. Lambert, et al., 309 U. S. 620. Public Service Commission, v. Columbia Terminals, 309 U. S. 620.

in each of which the main cause of action was under the provisions of Section 266 of the Judicial Code, it appears certain the the Supreme Court will not allow a *direct appeal* from an adverse ruling on a counterclaim, motion for damages, or other ancillary type of action, regardless of whether or not there is prosecuted a *direct appeal* from an adverse ruling on the three-judge injunction matter.

In the aforesaid Brashear case there was no appeal taken by plaintiffs at the end of the appeal period from the adverse action of the Court on the three-judge injunction matter. Appellants, however, including the Public Service Commission of the State of Missouri, prosecuted a *direct appeal* to the Supreme Court, believing that, notwithstanding, an appeal on the adverse ruling on the counterclaim would also go *direct* to the Supreme Court. But the Court *dismissed outright* the appeal on the counterclaim. (The present proceeding therefore constitutes the second effort of these petitioners to have their day in court on a part of the subject matter included in the Motion For Damages herein discussed.)

In the aforesaid Columbia Terminals case, plaintiff Columbia Terminal prosecuted a *direct appeal* to the Supreme Court from an adverse ruling by the three-judge Court on the injunction matter, as also did defendants Public Service Commission, and others, from an adverse ruling on their counterclaim for statutory license fees like those now under consideration. Although both appeals were based upon the same record, *the same opinion, the same decree*, and were prosecuted from adverse judgments therein of the same specially constituted, statutory three-judge District Court, acting under the provisions of Section 266 of the Judicial Code, nevertheless, the Supreme Court affirmed a motion to dismiss the direct appeal on the counterclaim, *and dismissed it outright.*

In both the Brashear and Columbia Terminals cases counsel for defendants below, who were appealing from adverse rulings of specially constituted three-judge courts on counterclaims set up in the answer to the main injunction petition, believed that the appeal would lie in the Supreme Court. It seemed *then* that, under the circumstances of joint handling of the injunctions and counterclaims by the same three judges in each respective case, and on the same com-

mingled record in each case, an appeal on an adverse ruling on such a counterclaim, or other ancillary matter, to the Circuit Court of Appeals would be illogical. Moreover, it seemed *then* that it would be impractical and burdensome to prepare two records for appeal, namely, one record on a direct appeal to the Supreme Court from an adverse ruling on the injunction matter and one record to the Circuit Court of Appeals from an adverse ruling on a counterclaim.

To avoid confusion the Supreme Court should adopt a clear rule for appeals in such ancillary matters. Perhaps the confusion commences when specially constituted three-judge statutory courts, together with Counsel, inadvertently assume that jurisdiction of such counterclaims or ancillary causes of action, as in the recent Eichholz, Brashear and Columbia Terminals cases, belongs to them. Perhaps the Supreme Court will adopt the rule that such ancillary matters, if they are to go to trial on the merits, should be remanded by the specially constituted three-judge statutory court to the single district judge who granted the temporary restraining order and fixed its terms and conditions for proceedings thereon to be taken independently of the provisions of Section 266 of the Judicial Code. If such a rule is fixed, the question of where an appeal from an adverse ruling thereon shall lie will be clear.

Such a rule was suggested by the opinion of the Circuit Court of Appeals now under review. But the Circuit Court although it suggested that which may be a good rule, did not accord appellants (petitioners here) the advantage of it. It is believed that its failure in that respect constitutes reversible error.

The Court dismissed outright the aforesaid Brashear and Columbia Terminals Company improvidently prosecuted direct appeals by Public Service Commission of the State of Missouri. It did not give relief as suggested, and as was accorded, in **Oklahoma Gas and Electric Company v. Oklahoma Packing Company,** 292 U. S. 306, whereby appellant was saved from an improvidently prosecuted direct appeal to the Supreme Court. See also, **William Jameson & Co. v. Morgenthau,** 307 U. S. 171, also **Rorick v. Board of Commissioners of Everglades Drainage District,** 307 U. S. 208, and **Wilentz v. Sovereign Camp, W. O. W.,** 306 U. S. 573.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the decision of the Circuit Court of Appeals should be reversed, and the cause be remanded to the District Court with directions to proceed to trial on the Motion For Damages.

JAMES H. LINTON,
DANIEL C. ROGERS,
COVELL R. HEWITT,
LOUIS V. STIGALL,
WILKIE B. CUNNYNGHAM,
Jefferson City, Missouri.

EDGAR H. WAYMAN,
HAROLD C. HANKE,
St. Louis, Missouri.

Attorneys for Petitioners.

January, 1941.

APPENDIX

Section 5272, Laws of Missouri, 1931, pp. 311-312, inclusive.

§ 5272. Annual license fee—allocation—penalty

(a) In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 5265 of this act shall, at the time of the issuance of a certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1 and January 15 of each calendar year, pay to the state treasurer of the state of Missouri the annual license fee, as set out in this act, for the maintenance and repair of the public highways; all such fees levied upon the issuance of a license to any motor carrier for any motor vehicle hereunder shall be reckoned from the beginning of the quarter in which such license was issued; *provided, however,* that no motor vehicle coming within the provisions of this act shall be used or licensed which has a greater dimension or weight than is now or may hereafter be provided by law. In all cases where the mileage of any route covered by any certificate of convenience and necessity and/or an interstate permit issued under the provisions of this act shall be in question, the public service commission shall by order determine such question and the order of the public service commission in such cases shall be final. For the purpose of determining the mileage of any such route, the certificate of the state highway commission, with respect to state highways, the county engineer, with respect to county or other highways not constituting a part of the state highway system, or of the streets of any municipal corporation, and in the case of streets in any municipal corporation, the certificate of any city engineer or mayor shall be accepted by the public service commission as conclusive evidence. *Provided,* that where a motor carrier is operating within this and an adjoining state and the total mileage of said route in Missouri is ten miles or less, the license fee shall be one-third or the license fee hereinafter set out. *Provided further,* that where a motor carrier is operating a route in this state, the total mileage of which is not greater than twenty miles, the

license fee shall be one-half of the license fee hereinafter set out. In case of emergency or usual temporary demand for transportation, the license fee or additional motor vehicle for limited periods shall be fixed by the commission in such reasonable amount as may be prescribed by general or temporary order. The commission, upon the issuance of a license for any vehicle, as defined in this act, shall notify the state treasurer who shall receive the license fee for such vehicle; and the commission shall also notify the state treasurer of the number of lineal miles of route used by the owner of that vehicle and the number of miles in which it operates on state roads, the number of miles it operates on county roads and the number of miles it operates on city roads not maintained by the state highway commission, and the state treasurer shall distribute and credit to the state highway commission and to the proper county or city in the proportion that the number of lineal miles of route used by the licensed motor vehicle in each case bears to the number of lineal miles of route over which such carrier operates and the said funds so derived from said license shall be used for the maintenance and repair of the highways and streets over which said carrier operates.

(b) For each motor vehicle operating under a certificate of convenience and necessity or interstate permit as a passenger carrying vehicle, the sum of ten dollars per passenger seat.

(c) In computing the annual license fee on each motor vehicle, trailer or semi-trailer, operating under a certificate of convenience and necessity or interstate permit as a freight carrying vehicle, the vehicle shall be rated on the manufacturer's rated load capacity or the actual weight carrying capacity of the vehicle, which capacity shall be determined by the public service commission at the time a certificate of convenience and necessity or interstate permit is issued. For each motor vehicle operating under a certificate of convenience and necessity or interstate permit as a freight carrying vehicle, the annual license fee shall be as follows:

More than 1½ and not more than 2 tons	$ 25.00
More than 2 and not more than 3 tons	65.00
More than 3 and not more than 4 tons	100.00
More than 4 and not more than 5 tons	135.00
More than 5 and not more than 6 tons	175.00
More than 6 and not more than 7 tons	225.00

More than 7 and not more than 8 tons..... 275.00
More than 8 and not more than 9 tons..... 350.00
More than 9 tons..... 500.00

(d).....
(e).....
(f).....

Rules of Public Service Commission (R 90).

√

BLANK PAGE

FILE COPY

Supreme Court, U. S.
FILED
DEC 2 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 549.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI et al.,
Petitioners,

vs.

BRASHEAR FREIGHT LINES, INC., et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

KENNETH TEASDALE,
B. W. LaTOURETTE,
PAUL G. KOONTZ,
Counsel for Respondents.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

BLANK PAGE

INDEX.

	Page
Published Report of Opinion Below	1
Statement of Case	2
Summary of Argument	7
Argument	11
I. The motion for rehearing was, in reality, in part a reassertion of a previous counterclaim, and in part a new counterclaim after decree and after the judgment term	11
It was not effective as a petition for rehearing in its first aspect, and was not effective as a counterclaim in its second aspect	11-12
The Circuit Court of Appeals (and the three-judge court) had jurisdiction to rule on the motion for damages, in its discretion. The discretion was not abused	13
II. (a) Upon adjudication of an injunction the Court has discretion as to whether or not it will entertain a motion for damages	14
(b) 1. Jurisdiction of the three-judge court was invoked. No motion to transfer to the District Judge was made	21
(b) 2. The "rule" concerning remission of ancillary matters to the District Judge was not followed by the Circuit Court of Appeals	21
(c) The motion for damages is ineffective as a petition for rehearing or as a counterclaim	22
No expenses were sought in the motion for damages	22

(d) 1. The subject matter of the motion for damages (and original counterclaim) did not arise out of the transaction, and could not have been the subject of an independent suit in equity 22

(d) 2. The State Treasurer alone can sue for the statutory fees 23

Conclusion 25

Table of Cases Cited.

Am. Mills Co. v. Am. Surety Co., 260 U. S. 360 10
Camp v. Boyd, 229 U. S. 530, l. c. 551, 552 16
Chicago v. Northwestern Ry. Co. v. Lindell, 281 U. S. 14, 17, 74 L. Ed. 670, 672 18
Deputy v. Du Pont, 308 U. S. 488, l. c. 500 ..... 8, 13
Eichholz v. Hargus et al., 23 Fed. Supp. 587 ..... 10, 18, 20
Grover v. Kirk, 187 Mo. App. 720 ..... 7, 12
Inland Steel Company v. United States, 306 U. S. 153, 83 L. Ed. 557, 560 15
Lehman v. Krentler-Arnold Hinge Last Co., 284 U. S. 448, 451, 76 L. Ed. 389, 393 17
McCrane v. U. S., 307 U. S. 61, 59 S. W. 685 ..... 7, 12
Magnum Import Co. v. Coty, 262 U. S. 159, 163 ..... 8, 14
Owl Creek Coal Co. v. Big Horn Collieries, 36 F. (2d) 485 15
Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273, l. c. 279 ..... 16, 21
Powell v. U. S., 300 U. S. 276 10
Railroad Commission of California v. Pacific Gas & Electric Co., 302 U. S. 388, 391, 82 L. Ed. 319, 321 ... 17
Russell v. Farley, 105 U. S. 433, 445 ..... 8, 14
Sovereign Camp, W. O. W., v. Murphy, 17 Fed. Supp. 651 17

Sterling v. Constantin, 287 U. S. 378, 393, 394, 77 L. Ed. 375, 383 17
United Motors Service v. Tropic-Aire, 57 F. (2d) 479..8, 15
Young Co. v. McNeal Edwards Co., 283 U. S. 398, 400 75 L. Ed. 1140-1141-1142..... 18

Statutes Cited.

Section 266, Judicial Code (28 U. S. C. A. 380).....2, 15
Section 5272, Missouri Bus and Truck Law, Laws of Missouri 1931, pp. 304-316, inclusive.....10, 22

Rules Cited.

Rule No. 13, Rules of Civil Procedure for District Courts of the United States..... 7
Rule No. 30, Rules of Practice in Equity.....7, 10, 13
Rule No. 69, Rules of Practice in Equity.....7, 12

Textbook Cited.

Simkins' Federal Practice, Revised Edition 1934, Sections 873, 874.....7, 12

BLANK PAGE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 549.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI et al.,
Petitioners,

vs.

BRASHEAR FREIGHT LINES, INC., et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

REFERENCE TO OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 113) is reported as follows:

> Public Service Commission of the State of Missouri et al. v. Brashear Freight Lines, Inc., et al., Circuit Court of Appeals, Eighth Circuit, 114 Fed. (2d) 1 (Adv. Op.).

STATEMENT OF THE CASE.

In August, 1938, a three-judge court rendered a decree dismissing a counterclaim by petitioners against respondents. Ten months later, and in the second term thereafter, petitioners filed a so-called Motion for Damages in the three-judge court, seeking relief by way of counterclaim. This counterclaim had been asserted before as to thirty respondents and was first asserted in this motion as to forty-six respondents. The Court dismissed the motion on the ground that the subject matter and the relief prayed for in it had been theretofore ruled and finally determined in the cause.

Petitioners appealed to the Circuit Court of Appeals of the Eighth Circuit. That Court affirmed the action of the three-judge court with one judge dissenting. A motion filed by respondents in that court to dismiss the appeal was not ruled upon.

Petitioners now seek the aid of this Court on the ground that:

(1) There is no clear rule as to jurisdiction over counterclaims in cases under Section 266 of the Judicial Code.

(2) The Circuit Court of Appeals stated (though it did not follow) a rule concerning remitting such ancillary claims to the district judge. This rule is said to be in conflict with the authorities.

(3) The three-judge court erred in not hearing the counterclaim and deciding it in favor of petitioners as to statutory license fees and expenses of preparation for trial.

(4) The Circuit Court of Appeals misconceived the rationale of the action of the three-judge court in dismissing the counterclaim and the motion for damages.

Respondents deny that these contentions are valid or entitle petitioners to a writ of certiorari.

In order that the facts may more clearly appear, we set out a chronological table of pertinent record entries. This shows the terms of court within which respective entries were made.

OCTOBER TERM, 1937.

May 15, 1937. Bill filed (R. 2);

September 17, 1937. **Answer and counterclaim filed** (R. 44);

September 22, 1937. General denial to counterclaim filed (R. 46). (It was understood that if the issues of the counterclaim became pertinent after trial of the injunction issue, appellees should have the right "to attack the counterclaim for misjoinder, nonjoinder, multifariousness, timeliness, lack of jurisdiction in the statutory three-judge court, or otherwise.") See statement of appellees to supplement, appellants' statement of evidence (R. 85).

September 24, 1937. Partial hearing.

January 31, 1938. Hearing resumed and completed (R. 79).

MARCH 21, 1938, FIRST DAY OF MARCH TERM, 1938.

June 15, 1938. **Opinion of District Court** (R. 49);

July 2, 1938. Findings of fact and conclusions of law of District Court filed (R. 56);

July 26, 1938. **Amended answer and counterclaim of certain defendants LODGED with Court** (R. 63);

August 4, 1938. **Decree dismissing counterclaim** (R. 69);

September 3, 1938. Petition for rehearing and motion to modify decree filed (R. 71);

September 16, 1938. **Order** modifying decree, but nonetheless **dismissing counterclaim and overruling petition for rehearing** (R. 76).

OCTOBER 17, 1938, FIRST DAY OF OCTOBER TERM, 1938.

December 15, 1938. **Motion of certain defendants for "Costs" filed** (R. 84);

December 17, 1938. Statement of appellees, supplementing statement of evidence, filed and approved (R. 85);

December 21, 1938. Citation for appeal to United States Supreme Court filed in District Court Clerk's office;

February 13, 1938. Appeal dismissed by Supreme Court of United States (R. 87).

MARCH 20, 1939, FIRST DAY OF MARCH TERM, 1939.

April 24, 1939. Mandate of Supreme Court of United States filed (R. 87);

May 22, 1939. **Motion for damages filed** (R. 90);

July 5, 1939. Order overruling motion for damages on the ground the subject matter thereof "has heretofore been ruled and finally determined in this cause" (R. 94). This order formed the basis of the appeal to the Circuit Court of Appeals.

October 3, 1939. Notice of appeal (R. 1).

We have emphasized entries deemed important here.

An analysis of the motion for damages discloses two purported bases of relief. First, it reasserted the original counterclaim for license fees against thirty of the plaintiffs below. (However, the time for which the fees are sought to be collected is reduced from six years to the period subsequent to entry of the restraining order [Par. 3, R. 91]). Second, for the first time is asserted the right against the remaining forty-six plaintiffs below to collect license fees for certain types of operation under the statute (Par. 4, R. 91). The motion is limited, by its terms, to fees and taxes. This motion was filed before the three-judge court

after this Court held it had no jurisdiction of a direct appeal on the issue of the counterclaim, inasmuch as the constitutional question was out of the case. This was because respondents did not appeal the decree dismissing their bill. They had sought an injunction against the Public Service Commission, the Superintendent of Highway Patrol, and the Attorney General to prevent them from enforcing certain provisions of the 1931 Motor Bus and Truck Laws of Missouri (R. S. Mo. 1929, Sec. 5264 et seq.). The law subjected motor carriers to certain license fees graduated according to weight carrying capacity of the truck to be licensed. The Act also prescribed fees of 50 per cent of the maximum for operations within a twenty-mile zone and 33⅓ per cent within a ten-mile zone, respectively, within the State. The short run license provisions, prior to institution of the suit, had not been enforced. The bill did not seek to restrain the State Treasurer, nor was he made a party to the suit. Certain of the defendants below filed a counterclaim against thirty of the plaintiffs seeking to collect license fees allegedly due for a period of years (R. 44). To this a general denial was filed with the arrangement, as respondents understood, that they might plead further to it later if so advised.

The issues of the counterclaim were not tried with the issues of the bill. Upon the decision of the latter, the Court dismissed the counterclaim without prejudice to the rights of petitioners and the other defendants below to maintain an independent action or suit thereon if they, or either of them, should be so advised. The Court indicated doubt as to the right of the defendants to maintain such a counterclaim. After motion for rehearing was overruled, an appeal was taken to this Court, which was dismissed.

Then (we quote these facts from petition for writ of certiorari, page 3, adding, however, our own emphasis),

"after the Supreme Court, for want of jurisdiction, had dismissed the aforesaid direct appeal, taken from the adverse decree of the District Court on the counterclaim, **it was too late for defendants to appeal from such adverse ruling of the three-judge court on the counterclaim to the Circuit Court of Appeals.** They, therefore, conceive it to be proper to **incorporate the same subject matter of the counterclaim** pertaining to the loss of the license fees in a **motion for damages** against plaintiffs and the surety on their injunction bond."

The issues on this application appear to respondents to be somewhat obscured by the fact that petitioners have not confined their complaint to the action taken by the three-judge court on the motion for damages (and, of course, the action of the Circuit Court of Appeals with reference to this), but seek to test the action of the three-judge court on the original counterclaim. Such action was not before the Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT.

I.

The matter in issue here is the action of the Circuit Court of Appeals in affirming the action of the three-judge court in overruling the motion for damages. The motion for damages is in reality a counterclaim previously relied upon as to thirty respondents and a counterclaim first asserted after decree and after the judgment term as to forty-six respondents. As to thirty respondents, the motion constituted an abortive petition for rehearing, which could be filed only during the judgment term.

Simkins' Fed. Practice, Revised Edition 1934, Sec. 874, p. 816;
Rules of Practice in Equity, Rule 69 then in effect;
McCrane v. U. S., 307 U. S. 61.

The Motion for Damages was not sworn to as required in the case of a petition for rehearing.

Rules of Practice in Equity, Rule 69;
Simkins' Fed. Practice, 1934, Sec. 873, p. 816.

Reassertion of a right denied by decree constitutes a collateral attack thereon, which is not permissible.

Grover v. Kirk, 187 Mo. App. 720.

As to the remaining forty-six respondents, the motion for the first time asserts relief by way of counterclaim after decree and judgment term. No authority exists for this.

Rules of Procedure for District Courts of the United States, Rule 13;
Rules of Practice in Equity, Rule 30.

The latter, then in force, provided that counterclaims should be stated in the answer.

The motion was ineffective in that it sought to assert substantive rights in the nature of a counterclaim in behalf of the Treasurer of the State of Missouri, not a party defendant in the bill and in no wise impleaded.

The three-judge court had jurisdiction in its discretion to decline to rerule on the subject matter of this motion for damages. It is not urged that the three-judge court had no such power. Instead, its action on the original counterclaim is attacked. As far as the record here goes, such action was not appealed from. Right or wrong, it is not here for consideration. Accordingly, the motion for damages is in effect a second petition for rehearing, filed more than ten days after decree and in the second term thereafter.

The granting of the writ of certiorari is discretionary and for situations similar to those dealt with in Rule 38.

Deputy v. DuPont, 308 U. S. 488, l. c. 500;
Magnum Import Co. v. Coty, 262 U. S. 159, l. c. 163.

II.

It is recognized that this Court may be disposed to deal with the motion for damages as if it were a counterclaim filed in due time. Such approach would enable petitioners to escape the effect of the untimeliness of their appeal to the Circuit Court of Appeals. Without waiving the point, and without inviting such consideration, respondents nonetheless deal with the issues thus presented.

(a) The rule is clear that the Court upon adjudication of an injunction or similar statute, has discretion as to whether or not it will entertain a motion for damages or similar ancillary matters.

Russell v. Farley, 105 U. S. 433;
United Motors Service v. Tropic-aire, 57 F. (2d) 479.

(b) 1. The opinion stated no erroneous rule. The opinion said that defendants' mistaken assumption as to jurisdiction in the Supreme Court led them to press the counterclaim before the three-judge court. It also qualified remarks concerning remission to the District Court from the three-judge court by indicating such might be done "upon presentation of the facts." Respondents did press their motion before the three-judge court and did not present to it any facts or request suggesting the alternative of remitting the matter to the District Judge.

2. Petitioners cannot complain that this "rule," as they call it, is at variance with various decisions referred to, inasmuch as the Court did not follow it.

(c) There is no authority for a petition for rehearing filed later than ten days after decree, or filed after the judgment term, and after one motion is overruled.

See Authorities under I.

There is no authority for a counterclaim first asserted after decree and after the judgment term.

See Authorities under I.

Petitioners cannot complain that damages and expenses were not allowed them, since none were asked in the motion for damages.

(d) The Court having once dealt with the counterclaim and overruled the petition for rehearing, could, and should, decline to entertain another petition for rehearing, or a reassertion of the counterclaim. After the three-judge court ruled on the counterclaim and overruled the petition for rehearing, and the term ended, petitioners' right was to appeal within ninety days. This is true whether the Court dismissed the counterclaim as a matter of discre-

tion, feeling the parties should go elsewhere to assert the subject matter, or whether the Court had doubt as to the right of any of the petitioners to maintain it.

(1) The counterclaim did not arise out of the transaction and could not have been the subject matter of an independent suit in equity.

Equity Rule 30;
Amer. Mills. v. Amer. Surety Co., 260 U. S. 360;
Powell v. U. S., 300 U. S. 276;
Eichholz v. Hargus, 23 Fed. Supp. 587.

(2) The State Treasurer alone can sue for the statutory fees.

R. S. Mo. 1929, Sec. 5272;
Eichholz v. Hargus, supra.

ARGUMENT.

I.

The Matter in Issue Here Is the Action of the Circuit Court of Appeals in Affirming That of the Three-Judge Court in Overruling the Motion for Damages. The Motion for Damages Is in Reality Reassertion of a Counterclaim Previously Denied as to Thirty Respondents and a Counterclaim First Asserted After Decree and After the Judgment Term as to Forty-six Respondents.

The three-judge court had jurisdiction in its discretion to decline to rerule on the subject matter of this motion for damages. It is not urged that the three-judge court had no such power. Instead, its action on the original counterclaim is attacked. As far as the record here goes, such action was not appealed from. Right or wrong, it is not here for consideration.

Petitioners lose sight of this fact, taking the position that the original counterclaim was before the Circuit Court of Appeals and is in the record for the consideration of this Court. Perhaps this is due to the fact that petitioners sought to use the expedient of a so-called motion for damages, filed ten months after the decree, and in the second term thereafter to afford the opportunity for a rehearing, and ultimately, to furnish the basis for appeal on the issues ruled in the counterclaim. They so state with commendable candor in the petition, page 3, which is quoted in the statement of facts.

The three-judge court acted on the subject matter of the counterclaim by dismissing it during the March Term, 1938. This action became final when the term ended. Ninety days after the overruling of the petition for rehearing, the time for appeal to the Circuit Court of Appeals elapsed. Not until the March Term, 1939, was the Motion

for Damages filed. The sole issue here is as to the propriety of the action of the three-judge court in overruling this motion, which attempted to reassert the same subject matter. At the time the three-judge court entered the decree dismissing the counterclaim on August 4, 1938 (after rendition of opinion, June 15, 1938), and entered the order overruling the petition for rehearing on September 16, 1938, in the March Term, 1938, the Equity Rules were in force.

McCrane v. U. S., 307 U. S. 61.

Petitioners' remedy then was by appeal from this order. At the close of the term thereafter, the Court had no further jurisdiction. Equity Rule 69 provided that a petition for rehearing should be filed at the judgment term. (See, also, Simkins' Fed. Practice, 1934 Ed., Secs. 873 and 874.) Even if the motion for damages could be considered as a petition for rehearing, it was inadequate for lack of verification.

Equity Rule 69;
Simkins' Fed. Practice, Sec. 873, p. 816.

Also a petition for rehearing should be filed at the judgment term.

Simkins' Fed. Practice, Sec. 874, p. 816;
Equity Rule 69.

The motion for damages, accordingly, amounts to nothing more than a collateral attack as to thirty respondents upon the decree dismissing the counterclaim, inasmuch as it reasserts a right denied by the decree.

Grover v. Kirk, 187 Mo. App. 720.

In so far as the motion for damages first presents a claim against the other forty-six respondents to collect license fees, it is an effort to assert a counterclaim after

decree and after close of the term at which it was rendered. The rules of procedure for the District Courts of the United States, Rule 13, or Rules of the Practice in Equity, Rule 30, neither present authority for such procedure. None is suggested by petitioners.

In view of the foregoing, it would appear that the action of the three-judge court on the motion for damages was so eminently correct as to leave the Circuit Court of Appeals no option but affirmance and as to form no adequate basis for an appeal by certiorari to the discretion of this Court.

Rule 38 of this Court presents the general type of situation in which it is contemplated that certiorari to the Circuit Court of Appeals may be granted. Overruling an effort again to litigate a matter previously presented and ruled on finally cannot be said to present a question of national importance. Petitioners have not shown any analogy with the suggestions of Supreme Court Rule 38, Pars. 5-a and b, indicating that there is a federal question of substance here not previously determined, or determined not in accordance with the decisions of this Court. A decree becomes final with the term. Consideration of the incidents of that doctrine presents no question of a type illustrated in Rule 38. We are pointed to no authority in petitioners' brief indicating to the contrary.

In Deputy v. Du Pont, 308 U. S. 488, in a dissenting opinion, Mr. Justice Roberts aptly says (l. c. 500):

> "The function of this Court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this Court to review judgments of lower federal courts was not intended to be exercised in every case where those courts have adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the federal courts. Our rules

> adopted to carry out the policy of the statutes, granting the power to bring cases here by certiorari, have apprised the Bar and the public that we will not take cases fully heard and adjudicated below for the mere purpose of re-examining the correctness of the result. See Rule 38, Par. 5, 28 U. S. C. A., following Sec. 354."

In Magnum Import. Co. v. Coty, 262 U. S. 159, l. c. 163, it is said that a lack of uniformity of decisions forms the basis for the granting of writs of certiorari. There is no lack of uniformity in the attitude of courts toward the principle of not redeciding at a subsequent term a case once decided.

For these reasons we respectfully submit that this case does not present a question reviewable by this Court on certiorari.

II.

It is recognized that this Court may be disposed to deal with the motion for damages as if it were a counterclaim filed in due time. Such approach would enable petitioners to escape the effect of the untimeliness of their appeal to the Circuit Court of Appeals. Without waiving the point, and without inviting such consideration, respondents nonetheless deal with the issues thus presented.

(a) **The rule is clear that the Court upon adjudication of an injunction, has discretion as to whether or not it will entertain a motion for damages or similar ancillary matters.**

Russell v. Farley, 105 U. S. 433, is cited by petitioners. It holds that the Court issuing an injunction has the power to dispose of the incidents arising therein. That is precisely what the three-judge court did and what the Circuit Court

of Appeals affirmed. The opinion also established the fact that the Court has the **power** to order the incidents to be disposed of elsewhere. We quote from the same paragraph petitioners quoted, 105 U. S., l. c. 446:

> "**But whilst the Court may have** (we do not now undertake to decide that it has) **the power to assess the damages, yet if it has that power it is in its discretion to exercise it or to leave the parties to an action at law.** No doubt in many cases the latter course would be the more suitable and convenient one." (Emphasis ours.)

The case upholds the action of the three-judge court in all respects. The action of the Circuit Court of Appeals in affirming the ruling presents no conflict with Russell v. Farley.

Of course, the opinion, rendered in 1882, could not have envisioned the situation created by the passage of Section 266, Judicial Code (28 U. S. C. A. 380) years later.

Inland Steel Co. v. U. S., 306 U. S. 153, is cited. The foregoing comment on Russell v. Farley pertains to the Inland case as well.

The next case cited is United Motors Service v. Tropic-Aire, 57 Fed. (2d) 479. This case holds that the Court disposing of the main relief may hold the case and assess damages or relegate the parties to an action at law. The opinion quotes part of the opinion of Russell v. Farley, supra. The case is authority for the very action taken by the three-judge court in this case and affirmed by the appellate court. The counterclaim was dismissed without prejudice to the right of the parties to proceed elsewhere.

The same comment applies to Owl Creek Coal Co. v. Big Horn Collieries, 36 F. (2d) 485.

If the doctrine of the above cases is sound, and petitioners apparently so assert, they have no just complaint here.

At the bottom of page 14 of the argument, petitioners say:

> If the three-judge court must remit to the District Court, it had no authority to dismiss the motion for damages.
>
> If the dismissal be considered as the action of a one-judge court, it "acted in conflict with the uniform rule in all circuits permitting the court **in its discretion** to render judgment for damages * * *."

As to the first contention above, the matter is first urged here. Until the Circuit Court of Appeals had rendered its opinion, petitioners were satisfied to present their matters to the three-judge tribunal. When the decree of August 4, 1938 (R. 69), dismissed the counterclaim because inter alia it had not been presented, petitioners urged the three-judge court to take jurisdiction, contending that they had "urged or presented" the matter to that Court. Can petitioners invoke the jurisdiction of the three-judge court and urge a matter before it, and thereafter complain if the court adopts their view to the extent of entertaining jurisdiction?

As to the second contention, the Court in its discretion dismissed the counterclaim and motion for damages. It is not seen how such action can conflict "with the uniform rule permitting the Court in its discretion" so to render judgment.

Camp v. Boyd, 229 U. S. 530, next cited by petitioners, states a general rule in circumstances which present no analogy to the instant situation.

Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273, is cited. It dealt with summary judgment against sureties on an appeal bond, and hence is not in point here. It does not hold that the Court may **not** remit the parties elsewhere for such relief.

On page 16 cases are cited in an effort to show that

three-judge courts may "retain jurisdiction to do complete justice." The first is Sterling v. Constantin, 287 U. S. 378. The case and the quotation have no bearing here. No counterclaim was involved. It holds that a three-judge court, having properly obtained jurisdiction under the statute, could deal with pertinent questions of law arising under the State Constitution and statutes, as well as under the federal law.

The second is Railroad Commission v. Pacific G. & E. Co., 302 U. S. 388. As the quotation indicates, this case holds that the three-judge court having jurisdiction was not confined to consideration of federal law, but could consider points of local law involved. There was no counterclaim.

The third case is Sovereign Camp v. Murphy, 17 Fed. Supp. 651. This was another case where the three-judge court, its jurisdiction properly invoked, had authority to try the entire case presented by plaintiff, including issues not involving constitutional questions.

We think these three cases shed no light on the situation here.

Next, on page 16, petitioners cite us to cases involving counterclaims.

Lehman v. Krentler etc. Co., 284 U. S. 448, was a contempt proceeding for violation of an injunction against patent infringement. The court was not a three-judge court. It was said that plaintiff, by bringing the suit, submitted to the jurisdiction of the court all issues embraced in the suit, including the counterclaim. That was no more than to say that in the instant case the three-judge court had authority and power to consider the counterclaim. It did so, and, in its discretion, dismissed the same.

The difference between the viewpoints of petitioners and respondents, apparently, is this: Respondents think the Court, in its discretion, acted wisely and correctly, and

without abuse thereof. Petitioners believe the Court should have acted the other way. This does not present the issue of the right of the three-judge court to deal with the subject matter. Petitioners really inveigh against the nature of its decision, rather than the fact that the Court undertook to render a decision.

Young Co. v. McNeal-Edwards Co., 283 U. S. 398, next cited, dealt with a Massachusetts statute concerning nonresidents bringing suit in that state. They were required to answer in an action brought by the opposite party involving the same subject matter. It was held that the Massachusetts statute was enforceable in the federal court. No counterclaim was involved. A separate suit was under consideration. This was not a three-judge case, nor was Chicago and Northwestern Ry. Co. v. Lindell, 281 U. S. 14, next cited. Furthermore, none of these cases presented the situation we have in the instant case, wherein none of the defendants was authorized to assert the matter set forth in the counterclaim.

Referring to the Eichholz case, 23 Fed. Supp. 587, petitioners imply that this case supports their view, that the three-judge court should have taken jurisdiction and decided the counterclaim.

The following excerpts show the attitude of the Court. We quote first from the minority opinion of Judge Otis, l. c. 599:

> "Defendants have asked leave to file a counterclaim. The plaintiff, it is alleged, owes the state fees for the use of the highways, which fees it has not paid. It is sought to recover them by this counterclaim. There are two reasons why I think the counterclaim should not be permitted to be filed, although I have little doubt that the fees sought are owing.
>
> "Equity Rule 30, 28 U. S. C. A., following section 723, authorizes (1) a counterclaim arising out of the

transaction which is the subject matter of the suit.' Also it authorizes (2) a 'counterclaim against the plaintiff which might be the subject of an independent suit in equity against him.' Two classes of counterclaims are thus provided for. Moore v. Cotton Exchange, 270 U. S. 593, 46 S. Ct. 367, 70 L. Ed. 750, 45 A. L. R. 1370. But obviously the counterclaim sought to be asserted here does not fall in class (2); it could not be made the subject of an independent suit in equity. (It might be made the subject of a suit at law.) Does it arise out of the transaction which is the subject matter of the suit?

"It is said in the opinion of the majority that it is doubtful if this counterclaim 'arose out of the transaction which is the subject matter of the suit.' I should go further in the same direction and say that it is certain the counterclaim does not arise out of the same transaction. What was 'the transaction' which is the subject matter of this suit?

"The Public Service Commission revoked or threatened to revoke the plaintiff's interstate permit and threatened then to prevent plaintiff operating without an interstate permit. The suit arises out of the withdrawal or threatened withdrawal of the permit and consequences incident to that withdrawal. The right to fees arises out of the use of the state's highways by plaintiff. Certainly the (a) withdrawal of the right to use the highways and (b) the use of the highways are not the same thing, not the same transaction. They are scarcely comparable, but, if comparable, they are not comparable as resembling one another, but as opposites.

"It is true that the plaintiff is operating under our temporary injunction. Because he is operating he owes fees. It may be said then that the counterclaim arises because of the injunction, and that the injunction arose from the threatened withdrawal of the interstate permit. That, however, is a connection quite remote between counterclaim and 'transaction' and not the immediate connection which the rule requires.

"My second reason for believing this counterclaim should not be entertained is this: If plaintiff owes fees for the use of the highways of the state he owes them to the state or to the state treasurer for the state. Sec. 5272, R. S. Mo. 1929, Mo. St. Ann., Sec. 5272, p. 6689. He does not owe them to the Public Service Commission whose members are the defendants in this case. Nor have I found any statute authorizing the Commission to sue for such fees as the agent of the state.

"In my view a permanent injunction should issue and leave to file the counterclaim should be denied."

Indeed, the majority opinion itself seems to conclude that the counterclaim is improper. It says (l. c. 593) (emphasis ours):

"Under Equity Rule 30, 28 U. S. C. A., following section 723, a defendant has a right to interpose a counterclaim 'arising out of the transaction which is the subject matter of the suit.' **It is doubtful whether these claims arose out of the transaction which is the subject matter of the suit, and yet, because of the injunction, the plaintiff elected to discontinue the payment of fees.**

"**No objection having been made to the filing of the counterclaim, this court will not interpose one under the circumstances of the case.** The question having been presented, it should be considered by us."

The counterclaim was not under consideration in the opinion of this Court in Frank Eichholz v. Public Service Commission, appearing at 306 U. S. 268.

To sum up, petitioners rely chiefly on Russell v. Farley, supra. That case holds that if the lower court has power to assess damages it is in its discretion to exercise it or leave the parties to an action at law. No doubt, in many cases the latter course would be more suitable and convenient.

In view of this case, petitioners' application here is un-

warranted. The case establishes a clear rule of discretion and the Circuit Court of Appeals has followed that rule.

(b) 1. **The opinion stated no erroneous rule.**

It is urged that the Circuit Court of Appeals stated an erroneous rule, to wit, that the three-judge court having discharged its constitutional function should remit the parties to the District Court for ancillary proceedings. If this be the rule, it has the qualifications referred to in the opinion. Facts should be presented entitling one to such remission. No motion was filed or oral application made presenting any facts, or seeking remission to the District Judge alone. On the contrary, petitioners pressed their matter for determination by the three-judge court. They cannot now be heard to deny jurisdiction in that court.

Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273.

(b) 2. **Petitioners cannot complain that this rule is at variance with decisions referred to, inasmuch as the Court did not follow it.**

Petitioners go to some length to explain that this "rule," as they understand it, is at variance with the cases. If the rule conflicts with the cases, and is unsound, there is still no ground for petitioners to complain that the Circuit Court of Appeals did not follow the allegedly erroneous rule. It did not remit the parties to the District Court, but ruled that it had jurisdiction. The concluding lines of the opinion are:

> "But we do not decide that the three-judge court was without jurisdiction to enter its decree and order dismissing the supposed ancillary litigation. **It had such discretion and there was no abuse.**" (Emphasis supplied.)

(c) **The motion for damages is insufficient as a counter-claim, or as a petition for rehearing.**

This subject has been discussed under point I of the brief. To repeat that discussion would but serve to prolong the brief, in violation of the spirit of Rule 38 of this court.

It is urged that the three-judge court should have allowed damages or expenses of preparation for trial. The motion did not contain any reference to such elements, any facts concerning them, or any prayer seeking relief of this nature. It referred purely to "the amount of license fees" (R. 93).

Here it is apposite to state that an abortive motion for "costs" was filed December 15, 1938 (R. 84). This was out of time, being filed at a term subsequent to the judgment term. This was filed but by two of the defendants who sought expenses, witness fees and attorneys' fees. The matter was not pursued further. No action to this day has been undertaken or taken to appeal the action, or the lack of action, on the part of the three-judge court with reference to this matter. It stands abandoned.

R. S. 1919, Sec. 5272, clearly shows that only the State Treasurer could assert the right and authority to demand fees. In the entire law (Mo. Bus and Truck Law, Laws of Mo. 1931, p. 304, Sec. 5267-b et seq.) there is only one section that deals with the subject of who shall collect the fees. That is section 5272, which provides that motor carriers, upon receiving a certificate or permit, shall "pay to the State Treasurer of the State of Missouri the annual license fee as set out in this act for the maintenance and repair of the public highways."

A review of the various sections of the act shows that, when regulation and policing is under consideration, reference is made to the Public Service Commission and power is granted to it; when the payment of license fees is dealt

with, authority is specifically stated to be in the State Treasurer. Sections dealing with the power and authority of the Public Service Commission, one of the petitioners here, are absolutely silent as to any power to collect license fees.

Petitioners do not attempt to show authority in themselves to collect these fees. Because they have the right to police the motor carrier industry, they do not acquire the right to sue for statutory fees. The analogy is presented, for instance, of a police officer. He may arrest one and impound his automobile, for failure to have a statutory license, but the officer could not sue for and collect the license fee. The Police Court could fine a motorist for failure to have a licen but the judge of the police court could not sue for and collect the license fee.

In the original counterclaim, filed July 17, 1937, nothing was said about the Treasurer, or an effort to collect on his behalf, or on behalf of the State of Missouri (R. 90).

No authority is shown in any of the appellants to sue in behalf of someone else not a party to the record. If the State Treasurer has rights, no doubt he can assert them in proper proceedings.

In concluding their brief, petitioners refer to cases where the Supreme Court made an "appropriate ruling" saving appellants from improvident, direct appeals. That issue was not before the three-judge court and hence not before the Circuit Court of Appeals. Accordingly, it could not have been the basis of error, conflict or other improper action justifying application for certiorari.

What that argument amounts to is a plea by petitioners for a right of appellate review. They obtained that very right in the Eighth Circuit Court of Appeals. That Court decided the issue on its merits without reference to a motion filed by respondents to dismiss the appeal. Petitioners

cannot complain if appellate jurisdiction lies with the Circuit Court of Appeals, however much they might prefer to urge their contentions here.

Before concluding, two comments, not pertinent to the foregoing matters, appear necessary: On page 2 in the petition for certiorari it is said:

> "The defendants **timely filed** an amended answer and counterclaim (r. 63) * * *."

Nothing more is said about this matter. To avoid confusion, we point out this fact. It forms no basis of any relief sought here or elsewhere; also the amended answer and counterclaim was not "timely filed"; it was "LODGED" with the Court (R. 63) six weeks after the opinion was filed (R. 49), and over three weeks after the findings of fact were filed (R. 63). It was never filed with the clerk and no proceeding was ever brought to test the issue. The paper is not before this Court for consideration, never having been filed in the cause. Efforts to cause it to be filed were abandoned by inaction after lodging the paper with the clerk.

A second inadvertence appears on page 17. Petitioners in their brief say:

> "Believing that plaintiffs below would prosecute a direct appeal from the adverse ruling on the injunction," etc.

There was no ground for petitioners so to believe. The record shows respondents served no appeal papers. Petitioners' belief is outside of the record. It necessitates a similar excursion by respondents. Petitioners' counsel was informed of the intention of respondents not to appeal.

CONCLUSION.

We sum up the situation thus: The "Motion for Damages" was filed late. It is not a motion for damages at all, but a double counterclaim. The counterclaim does not arise out of the transaction, the subject of the main suit, and is not such as could be the subject of an independent action in equity. Part of the counterclaim covered matter previously asserted in a counterclaim, which was dismissed, and as to which action a petition for rehearing was overruled at a previous term. The other part of the counterclaim was first asserted after trial and judgment, and after close of the judgment term.

In the circumstances, it is believed that no ground for certiorari is disclosed or exists. Accordingly, we respectfully ask that certiorari be denied.

Respectfully submitted,

KENNETH TEASDALE,
B. W. LaTOURETTE,
PAUL G. KOONTZ,
Counsel for Respondents.

BLANK PAGE

Office - Supreme Court, U. S.
FILED
MAR 3 1941
CHARLES ELMORE CROPLEY
CLERK

No. 549.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI et al.,

Petitioners,

vs.

BRASHEAR FREIGHT LINES, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS.

KENNETH TEASDALE,
B. W. LaTOURETTE,
St. Louis, Missouri,
PAUL G. KOONTZ,
Kansas City, Missouri,
Attorneys for Respondents.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

BLANK PAGE

INDEX.

	Page
Published report of opinions below	1
Statement of case	2
Summary of argument	7
Points and authorities	10
Argument	12
Specification I—	
A. Preliminary suggestions	12
B. Primary question: Are petitioners or any of them proper parties to maintain the motion for damages?	12
C. Equity invests petitioners with the right to maintain the motion for damages	18
D. Statutes authorize the Public Service Commission to collect license fees	21
E. The Public Service Commission has always collected license fees	24
F. Implied powers of the Commission	25
G. Eichholz case holds the Commission is proper party to maintain action for fees	26
H. Attorney-General also may maintain action to collect fees	29
Specification II—	
A. Preliminary discussion	31
B. Did the Three-Judge Court abuse its discretion by overruling the motion for damages?	31
C. Discussion of applicable decisions	33
D. Equity will do complete justice	41
E. Abuse of discretion to disallow expenses of defense	43

Specification III—

A. Duty to remand motion for damages to District Judge 44

Appendix 49

Cases Cited.

Barr v. Lake, 147 Mo. App. 252, 126 S. W. 755 ..... 11, 21
Brashear etc. Co. v. Public Service Comm., 23 F. Supp. 865 1
Camp v. Boyd, 229 U. S. 530 40
Chicago & Northwestern Railway Co. v. Lindell, 281 U. S. 14 43
Columbia Terminals v. Lambert et al., 309 U. S. 620 .. 46
Eichholz v. Hargus et al., 23 Fed. Supp. 587 ..... 10, 26, 27
Frank Eichholz v. Public Service Commission, 306 U. S. 268, l. c. 269 28
Fears v. Riley, 147 Mo. 453, 48 S. W. 828 ..... 11, 44
Greenway v. James, 34 Mo. 328 ..... 11, 21
Grover v. Kirk, 187 Mo. App. 720 ..... 10, 16
Helvering v. Gowran, 302 U. S. 238, 58 S. Ct. 154 .... 10, 16
Helvering v. Minn. Tea Co., 296 U. S. 378, 56 S. Ct. 269 ..... 10, 20, 45
Hoffman v. Parry, 23 Mo. App. 20 ..... 11, 21
Inland Steel Company v. United States, 306 U. S. 153 ..... 11, 40
Joplin State Bank v. Heaton (Mo. App.), 180 S. W. 19 ..... 11, 44
Lehman v. Krentler-Arnold Hinge Last Co., 284 U. S. 448 42
McCrone v. United States, 307 U. S. 61 ..... 10, 16, 30
North American Accident Ins. Co. v. Tebbs, 107 Fed. (2d) 853 ..... 10, 16
Owl Creek Coal Co. v. Big Horn Collieries, 36 F. (2d) 485 ..... 11, 40

Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273 40
Public Service Commission v. Brashear et al., 306 U. S. 204, 114 Fed. (2d) 1 ..... 1, 17, 45
Railroad Commission v. Pacific G. & E. Co., 302 U. S. 388 42
Russell v. Farley, 105 U. S. 433 ..... 11, 39, 40
Sovereign Camp v. Murphy, 17 Fed. Supp. 651 42
State ex rel. Winn, State Treasurer, v. Banks (Mo. Supp.), 145 S. W. (2d) 362 ..... 10, 19, 22
Sterling v. Constantin, 287 U. S. 378 41
United Motors Service, Inc., v. Tropic-Aire, Inc., 57 Fed. (2d) 479 ..... 11, 33, 35, 41
Virtue v. Creamery etc. Co., 227 U. S. 8, 33 S. Ct. 202 ..... 10, 20, 45
Young Co. v. McNeal-Edwards Co., 283 U. S. 398, 400 .. 42

Statutes Cited.

Revised Statutes of Missouri 1929:
Sec. 698 ..... 10, 18
Sec. 11276 ..... 10, 19, 22, 29
Sec. 11425 ..... 10, 22
Sec. 5229 25
Sec. 5268 ..... 21, 49
Sec. 5272 ..... 10, 19, 23
Sec. 5279 33
Sec. 7761 22
Sec. 230, Title 28, U. S. C. A., 43 Stat. 940 17

Rules Cited.

Rules of Civil Procedure for District Courts of the United States:
Rule 13 16
Rule 17 ..... 10, 16, 18
Rule 18 ..... 11, 34

Rule 19 .....11, 34
Rule 20 .....11, 33, 34
Rule 22 .....11, 34
Rules of Practice in Equity:
Rule 30 .....11, 16, 30
Rule 31 .....11, 30
Rule 37 .....10, 18
Rule 69 .....10, 16

Textbooks Cited.

Simkins Federal Practice, Revised Edition, 1934, Sec. 874, p. 816.....10, 16
Simkins Federal Practice, Revised Edition, 1934, Sec. 708, p. 669.....11, 30
32 Corpus Juris 442.....11, 44

No. 549.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI et al.,

Petitioners,

vs.

BRASHEAR FREIGHT LINES, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinion of the Three-Judge Court is reported as Brashear Freight Lines, Inc., et al. v. Public Service Commission et al., 23 F. Supp. 865; that of the Supreme Court on the direct appeal is Public Service Commission v. Brashear, 306 U. S. 204, 59 Sup. Ct. 480. The opinion of the Circuit Court of Appeals appears as Public Service Commission et al. v. Brashear Freight Lines, Inc., et al., 114 F. (2d) 1. Certiorari was granted in memorandum opinion, 61 Sup. Ct. 392.

GROUNDS ON WHICH JURISDICTION INVOKED.

Petitioners sought a writ of certiorari from this Court to the Circuit Court of Appeals, Eighth Circuit, by petition filed November 4, 1940. The writ was granted December 16, 1940 (R. 107).

Petitioners based their application on Section 240, Judicial Code (28 U. S. C. A. 347), and on Supreme Court Rule No. 38.

Respondents filed a brief in which they urged that no case for relief by way of certiorari was presented.

STATEMENT OF THE CASE.

May 15, 1937, respondents filed a bill in equity against petitioners, seeking to enjoin them from stopping or interfering with the operations of respondents as interstate motor carriers in Missouri. More particularly the petition charged that the Missouri Bus and Truck Law (Laws of Mo. 1931, as amended, R. S. Mo. 1929, Sec. 5264 et seq.) was unconstitutional. After hearing the bill was dismissed by the Court (R. 61).

A counterclaim, filed by petitioner Public Service Commission alone, was dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action thereon (R. 67).

After an abortive appeal here (R. 76), all petitioners filed a document styled "Motion for Damages" (R. 79). This was overruled (R. 83) (as was a motion to reconsider it [R. 83 and 89]). An appeal was taken to the Circuit Court of Appeals. Appellees there, respondents here, filed a motion to dismiss the appeal (R. 97) and a brief on the merits (R. 98).

By opinion (R. 99) and decree (R. 105) the Circuit Court of Appeals affirmed the action of the Three-Judge Court

in dismissing the motion for damages. No ruling was made as to the motion to dismiss the appeal.

So the situation here presented is this:

In June, 1938 (R. 43), the Three-Judge Court filed an opinion, and in August, 1938, rendered a decree dismissing a counterclaim of **one** petitioner against thirty of the respondents. Ten months later, and in the second term thereafter, **all** petitioners filed a so-called motion for damages in the Three-Judge Court seeking relief by way of counterclaim against all seventy-six respondents. This counterclaim included matter previously asserted (and by the Court denied) as to thirty respondents, and, for the first time, asserted a similar claim against the remaining forty-six respondents.

The Three-Judge Court dismissed the motion for damages on the ground that the subject matter and the relief prayed for in it had theretofore been ruled and finally determined in the cause.

The Circuit Court of Appeals held that the Three-Judge Court had discretion to entertain or refuse to entertain the ancillary litigation, and that taking the latter course involved no abuse of such discretion.

We set out below the dates of record entries of significance here, and a statement showing the terms of the District Court during which they were made. Entries deemed of greater importance are emphasized.

OCTOBER TERM, 1937.

May 15, 1937. Bill filed (R. 3);

September 17, 1937. **Answer and counterclaim filed** (R. 26);

September 22, 1937. General denial to counterclaim filed (R. 40). (It was understood that if the issues of the counterclaim became pertinent after trial of

the injunction issue, appellees should have the right to amplify this pleading. See Statement of Appellees to Supplement Appellants' Statement of Evidence [R. 75].)

September 24, 1937. Partial hearing.

January 31, 1938. Hearing resumed and completed.

MARCH 21, 1938, FIRST DAY OF MARCH TERM, 1938.

June 15, 1938. **Opinion of District Court** (R. 43);

July 2, 1938. Findings of fact and conclusions of law of District Court filed (R. 48);

July 26, 1938. **Amended answer and counterclaim of certain defendants LODGED with Court** (R. 55);

August 4, 1938. **Decree dismissing counterclaim** (R. 61);

September 3, 1938. Petition for rehearing and motion to modify decree filed (R. 62);

September 16, 1938. **Order** modifying decree, but nonetheless **dismissing counterclaim and overruling petition for rehearing** (R. 67).

OCTOBER 17, 1938, FIRST DAY OF OCTOBER TERM, 1938.

December 15, 1938. **Motion of certain defendants for "Costs" filed** (R. 73).

December 17, 1938. Statement of appellees, supplementing statement of evidence, filed and approved (R. 75);

February 13, 1938. Appeal dismissed by Supreme Court of United States (R. 77).

MARCH 20, 1939, FIRST DAY OF MARCH TERM, 1939.

April 24, 1939. Mandate of Supreme Court of United States filed (R. 76);

May 22, 1939. **Motion for damages filed** (R. 79);

July 5, 1939. **Order overruling motion for damages** on the ground that subject matter thereof "has heretofore been ruled and finally determined in this cause" (R. 83). This order formed the basis of the appeal to the Circuit Court of Appeals.

October 3, 1939. Notice of appeal to Circuit Court of Appeals (R. 1).

August 26, 1940. Opinion of Circuit Court of Appeals (R. 99).

An analysis of the motion for damages discloses, as stated above, two purported bases of relief. First, it reasserted the original counterclaim for license fees against thirty of the plaintiffs below. (However, the time for which the fees are sought to be collected is reduced from six years to the period subsequent to entry of the restraining order [Par. 3, R. 80]). Second, for the first time is asserted the right against the remaining forty-six plaintiffs below to collect license fees for certain types of operations under the statute (Par. 4, R. 80).

The motion (R. 82) prays that

> "the Court * * * take steps * * * required * * * to ascertain and determine **the amount of license fees** * * * which * * * remained unpaid **and to assess said sum and costs** AS DAMAGES in favor of defendants or the State of Missouri, or the State Treasurer of the State of Missouri * * * and for judgment against plaintiffs for said amount * * *" (Emphasis ours).

Neither the State of Missouri nor the Treasurer of the State was a party to the litigation.

The Missouri Bus & Truck Act prescribed fees for the use of the highways graduated upon a vehicle capacity basis. The act prescribed fees of 50 per cent of the maximum for twenty-mile runs into the state, and 33⅓ per

cent for ten-mile runs. These were referred to as "border city" operations. From the enactment of the law in 1931 until the filing of the instant suit, no effort was made to collect "border city" fees. During the pendency of the case, no effort was made to collect them from carriers not parties to the suit.

A stipulation (R. 77) was entered into providing for the collection of certain fees by a trustee pending the litigation. In this way over $100,000.00 was collected and later turned over to the State Treasurer. Respondents believed the stipulation was not intended to coven "border city" operations (R. 76).

The original counterclaim and the motion for damages dealt solely with fees for these "border city" operations. A general denial was filed to the original counterclaim with the understanding (R. 75) that respondents did not waive their right to attack the counterclaim "for misjoinder, nonjoinder, multifariousness, timeliness, lack of jurisdiction in the statutory Three-Judge Court, or otherwise" (R. 75).

Bonds of ten and twenty thousand dollars respectively were filed by the original plaintiffs (and later interveners), as a condition of the entry of the restraining order. Petitioners did not cause them to be set out in the record here.

Six weeks after rendition of the Three-Judge Court opinion, petitioners LODGED with the clerk an amended answer and counterclaim (R. 55). This was never "filed" or acted upon, nor were any further steps taken with reference to it. In petitioners' brief (p. 5) it is said defendants FILED this amended answer and counterclaim. The verb is an inadvertence.

Six months after the opinion and at a subsequent term,

petitioners Public Service Commission and Attorney-General filed a motion for costs (R. 73). This was never acted upon. Likewise, no further steps were taken with reference to it.

The foregoing by way of modification and amplification is deemed necessary to supplement the statement of petitioners.

SUMMARY OF THE ARGUMENT.

Petitioners summarize their argument under three main specifications. Respondents adopt the same numerical order in dealing with them.

SPECIFICATION I.

Respondents say the Circuit Court of Appeals erroneously assumed that the Three-Judge Court in dismissing the counterclaim and motion for damages acted in the exercise of a "supposed" discretionary right. They contend that really the Three-Judge Court ruled as it did because it had doubt as to the right of defendants below or any of them to prosecute the claim. Petitioners urge, variously, that this latter question, called the primary question, was never decided by the Circuit Court of Appeals (Petitioners' Brief p. 9), but that the Three-Judge Court did decide it, but did so adversely to their contentions (Petitioners' Brief pp. 16 and 17).

Respondents contend that the Three-Judge Court had an unquestionable discretionary right to dismiss the ancillary litigation, and that that Court acted in the exercise of this right. Respondents assume that doubt as to the right of any or all defendants to prosecute the claim, inter alia, entered into consideration of the question. Further, respondents assert that no defendant had such right, that only the State Treasurer could collect license

fees and that he could sue for them only by proceeding in the name and behalf of the state. Neither the Treasurer nor the state was a party defendant.

Respondents contend also that the question of the right of various parties defendant to prosecute the counterclaim or motion for damages was not decided by either the Three-Judge Court or the Circuit Court of Appeals. Indeed, respondents assert that that issue was not before the Circuit Court of Appeals. The question there was whether the Three-Judge Court was justified in overruling the motion for damages inasmuch as the controlling question in it had been previously decided.

SPECIFICATION II.

Petitioners assert that the Three-Judge Court abused its discretion (1) in dismissing the counterclaim and (2) in relegating petitioners to seventy-six separate actions at law or in equity in different forums in numerous states.

Respondents' position is that the Three-Judge Court in its discretion could assume jurisdiction of the counterclaim and motion for damages (if other jurisdictional requirements existed) or not; that no cases deny the existence of this discretion.

The Three-Judge Court by the negative act of refusing to assume jurisdiction of the counterclaim or motion for damages did not perform a positive act of "relegating" petitioners anywhere; if the result of the decree dismissing the motion for damages is that petitioners do sue elsewhere, adequate tribunals, state and federal, are available to them. Accordingly they may have their day in court. In a proper proceeding any and all respondents, including nonresidents, may be proceeded against in the State of Missouri and no doubt in one suit. Also peti-

tioners will be put to no other or further inconvenience than that normally attendant upon the activities of the sovereign in collecting taxes from individual taxpayers.

Petitioners assert there was further abuse of discretion in disallowing expenses of defense. Respondents reply that the motion for damages included no such element; that the field was pre-empted by a previous motion for costs; and that if treated as a motion for costs and expenses the motion for damages fails, inasmuch as it was not filed during the judgment term.

SPECIFICATION III.

Petitioners inquire whether the Three-Judge Court should not have remitted considerations of the counterclaim and the motion for damages to the District Judge for further proceedings. They disavow any interest in the matter now, though they strongly urged its importance in their petition for certiorari.

Respondents answer: if there be such a rule, it does not deprive the District Judge of discretion in handling the matter thereafter. Since District Judge Collet concurred in the action of the other members of the Court in the dismissal of the counterclaim, he would, if the sole arbiter, likewise have dismissed it. Hence petitioners are not harmed. Again the practice (if such there be) of remitting ancillary matters to the District Judge is not automatic. It may be ordered "upon presentation of the facts" by the parties.

No motion was presented or other action taken toward this end. On the contrary petitioners at all times invoked the jurisdiction of the Three-Judge Court. On appeal to the Circuit Court of Appeals they suggested no such matter. Hence the point is foreclosed.

POINTS AND AUTHORITIES.

The judgment of the Three-Judge Court was properly affirmed by the Circuit Court of Appeals if sustainable on any ground.

Helvering v. Gowran, 302 U. S. 238, 58 S. Ct. 154;
North American Accident Ins. Co. v. Tebbs, 107 Fed. (2) 853.

The judgment of the Three-Judge Court on the counterclaim may not be collaterally attacked.

Grover v. Kirk, 187 Mo. App. 720.

Under the Rules of Practice in Equity, a motion for rehearing was valid only if filed to the judgment term.

McCrone v. U. S., 307 U. S. 61;
Simkins Fed. Practice, Revised Ed. 1934, Sec. 874, p. 816;
Rules of Practice in Equity, Rule 69 (in effect during the March Term, 1938).

Suits are maintainable only by the real party in interest.

Rule 17—Rules of Practice in the District Courts of the United States;
Rules of Practice in Equity, No. 37;
R. S. Mo. 1929, Sec. 698.

The State Treasurer was the party to collect the license fees for motor vehicles.

R. S. 1929, Sec. 5272, Sec. 11276 and Sec. 11425;
Eichholz v. Hargus et al., 23 Fed. Supp. 587, opinion of Otis, J.;
See, also, State ex rel. Winn, State Treasurer, v. Banks, (Mo. Sup.), 145 S. W. (2d) 362.

Petitioners may not in this court for the first time attack the record before the Three-Judge Court and the Circuit Court of Appeals.

Helvering v. Minn. Tea Co., 296 U. S. 378, 56 S. Ct. 269;
Virtue v. Creamery etc. Co., 227 U. S. 8, 33 S. Ct. 202.

Under a general denial the pleader may prove any fact going to show claimant never had a cause of action against him.

Hoffman v. Parry, 23 Mo. App. 20, l. c. 29;
See, also, Barr v. Lake, 147 Mo. App. 252, 126 S. W. 755, and
Greenway v. James, 34 Mo. 328.

A counterclaim under Equity Rule 30 must arise out of the transaction which is the subject matter of the suit.

Rules of Practice in Equity, No. 30.

A counterclaim may not be used to introduce new parties.

Rules of Practice in Equity, No. 30 and No. 31;
Simkins Federal Practice, 1934 Edition, Sec. 708.

Claims against several carriers for license fees may now be united in a single suit.

Rules of Civil Procedure for the District Courts Nos. 18, 19, 20 and 22.

The Court trying an injunction matter may in its discretion leave the parties to their remedy elsewhere on ancillary matters.

Inland Steel Company v. United States, 306 U. S. 153;
Owl Creek Coal Co. v. Big Horn Collieries, 36 F. (2d) 485;
Russell v. Farley, 105 U. S. 433;
United Motors Service, Inc., v. Tropic-Aire, Inc., 57 Fed. (2d) 479.

A motion for costs must be filed during the judgment term.

32 C. J. 442;
Fears v. Riley, 147 Mo. 453, 48 S. W. 828;
Joplin State Bank v. Heaton (Mo. App.), 180 S. W. 19.

ARGUMENT.

I.

A) Preliminary Suggestions.

Here petitioners outline the three main contentions of their brief.

B) Primary Question: Are Petitioners or Any of Them Proper Parties to Maintain the Motion for Damages?

Under this caption (Brief pps. 16 and 17) petitioners state that the Three-Judge Court decided this question, and decided it adversely to their contentions. They maintain that the Circuit Court of Appeals did not decide the question.

As to the first contention, it apparently is inferred from the language of the decree dismissing the counterclaim that the Three-Judge Court **decided** that none of defendants was entitled to prosecute the demand.

The order referred to is as follows:

> "4. That as to the issue raised by defendants' counterclaim, the court being in **serious** doubt as to the right of **the defendants** to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if **they or either of them** shall be so advised." (Emphasis supplied.)

Respondents concede that the Circuit Court of Appeals treated the order as made in the exercise of the discretion lodged in the Three-Judge Court. Respondents maintain that it was so made.

Had the Three-Judge Court **decided** that none of the defendants could have maintained the counterclaim, it

would not have dismissed the counterclaim **without prejudice** to the right to proceed elsewhere.

Furthermore, the Three-Judge Court, without **deciding** the rights of any party, envisaged the possibility of multifariousness and defects as to parties. The dismissal was "without prejudice to the right of the **defendants, or either of them,**" to proceed elsewhere.

Had the Three-Judge Court decided the rights of the parties it would have so indicated instead of, as it did, leaving undetermined the question as to which, if any, of them might maintain an independent action.

It is apposite to state here the petitioners have so little confidence in the point that they abandon it later. Having urged that the counterclaim was decided on the issue of parties and **not on the issue of discretion**, they contend (Brief p. 12) that the Three-Judge Court "refused to do anything whatsoever," and later "in like manner * * * overruled the motion for damages." It is argued, then, that these "transactions" constitute **an abuse of discretion.** Of course, there cannot be an abuse of discretion and a failure to exercise discretion in the same judicial act.

Also, if, as petitioners contend, the issue of parties was **decided** adversely to their interests, that is (but for appellate review), completely foreclosed how can they urge in the same breath (Brief p. 12) that the "act of relegating * * * petitioners to * * * separate actions * * * in many different forums * * * **constitutes an abuse of judicial discretion in itself.**" If the issue had been decided and hence foreclosed, there could doubtless be no "relegation" elsewhere.

Finally, as to this contention, stress is laid upon the statement in the order to the effect that the Court had

doubt, **serious** doubt, as to the right of the defendants to maintain such counterclaim.

To us the very expression connotes the exercise of discretion. It is not decretal language, or language of decision. The Circuit Court of Appeals, when it decides issues, reaches a conclusion. It does not confine its order to the mere expression of doubt concerning the issue. Doubt may lurk behind many decisions. The mere expression of it, without more, does not constitute decision.

The possession of doubt as to defendants' rights may have been, and no doubt was, a factor of importance in the discretionary decision not to entertain the counterclaim. That is not to say there was no exercise of discretion.

On page 17 in the brief petitioners state that the rules of civil procedure govern our scrutiny of the **motion for damages.** This appears doubtful. The motion for damages, it is true, was filed after the effective date of the rules. However, petitioners commingle with their grievances about the treatment of the motion, their grievances concerning the fate of the counterclaim. Thereby they set the standard of judgment. The counterclaim is to be judged by the procedure under Equity Rule 30. This is pointedly evident when we recall the frank confession that the motion was an attempt, after expiration of the time for appeal to the Circuit Court of Appeals from the ruling on the counterclaim, to create the semblance of timeliness. Petitioners state (Brief p. 7):

> "After the Supreme Court, for want of jurisdiction, had dismissed the aforesaid direct appeal taken from the adverse decree of the District Court on the Counterclaim, it was too late for defendants to appeal from such adverse ruling of the Three-Judge Court on the counterclaim to the Circuit Court of Appeals. They,

> therefore, conceived it to be proper to incorporate the same subject matter of the Counterclaim * * * in a Motion for Damages."

At the bottom of page 17 statements are made indicating that petitioners misconceive, in other respects, the nature of the order.

The Three-Judge Court declined, in its discretion, to entertain jurisdiction of the counterclaim. This was a **negative** act, so to speak. It did not, as petitioners assume, perform the further **positive** act of "relegating" them, or either of them, eleswhere. To relegate means to send. Petitioners, if this order is upheld, are not sent or forced to proceed elsewhere. They can abandon further pursuit of these respondents just as they have of the scores of other carriers similarly situated, not parties to the litigation.

By reference to the views of Judge Otis in his dissenting opinion in Eichholz v. Hargus, 23 Fed. Supp. 587, petitioners infer that in the instant case he acted upon the conviction that "neither the Public Service Commission nor any of the defendants were the right parties to maintain * * *" the counterclaim.

From this the further inference is drawn that the other two members of the court were persuaded to agree with him (Brief p. 18). Inference upon inference erects entirely too tenuous a basis for this conclusion.

Finally, it is said that this Court should decide the question of the right of parties. This desideratum does not follow. The question actually before the Circuit Court of Appeals was the propriety of the order of July 5, 1939 (R. 83), overruling the motion for damages on the ground the subject matter thereof had theretofore been ruled and finally determined.

The Circuit Court of Appeals could have sustained the action of the Three-Judge Court as being sound for other reasons. This it could properly have done, regardless of reasons assigned by the Three-Judge Court. And, in turn, its judgment is to be upheld here if sustainable on any reasonable ground.

> Helvering v. Gowran, 302 U. S. 238, 58 S. Ct. 154;
> North American Accident Ins. Co. v. Tebbs, 107 Fed. (2d) 853.

Other reasons justifying the action of the Three-Judge Court follow.

The motion constituted, as to thirty defendants, the reassertion of rights already decided by dismissal of the original counterclaim. In that aspect it was a collateral attack on the judgment and therefore ineffective.

> Grover v. Kirk, 187 Mo. App. 720.

If viewed as a motion for rehearing, it was defective because one such motion had already been filed and overruled (R. 62). Furthermore, it was not filed during the judgment term.

> McCrone v. U. S., 307 U. S. 61;
> Simkins Fed. Practice, Revised Ed. 1934, Sec. 874, p. 816;
> Rules of Practice in Equity, Rule 69 (in effect during the March Term, 1938).

On the other hand, the motion for damages constituted, as to the remaining forty-six respondents, the assertion for the first time of a right to affirmative relief by way of counterclaim. A counterclaim must be filed with the answer under the new rules (Rules of Civil Procedure 13 and 17) or the old (Equity Rule 30).

At all odds, a counterclaim may not be first asserted ten months after decree and in the second term thereafter.

No authority for such practice is cited. Beyond peradventure, none can be found.

Viewed in the light of the above considerations, the Three-Judge Court acted properly in its treatment of the motion for damages. It follows that the Circuit Court of Appeals was not in error in sustaining that action.

In addition, the Circuit Court of Appeals could properly have based its affirmance on the ground the appeal was untimely, inasmuch as it was taken more than three months after entry of final judgment in the Three-Judge Court.

Sec. 230, Title 28, U. S. C. A., 43 Stat. 940.

Also, the Circuit Court of Appeals could properly have concluded to affirm the action below, in view of the matter presented in the statement of appellees supplementing the statement of evidence. This was the understanding of respondents, that the stipulation was not intended to cover border city operations. The Court may have considered this understanding justifiable. Viewed in such light the Court then might well have concluded that presentation of a counterclaim was inequitable. Or the view could have been taken that the situation presented a case where there was no meeting of the minds in the stipulation. In that event the Court could have properly concluded that an attempt to try the issue as thus obscured would be unwise.

The Circuit Court of Appeals could have affirmed the Three-Judge order, because it deemed the counterclaim multifarious; or because tax collection suits are not within equity jurisdiction as actions for accounting (Public Service Comm. v. Brashear etc., 114 F. [2d] 1, l. c. 3, note).

It might have concluded, in view of the counterclaim, the amended counterclaim lodged with the clerk, the motion for costs, and finally the motion for damages, peti-

tioners evidenced such a lack of clarity of intention and objective as to justify renouncing jurisdiction.

Finally, the Circuit Court of Appeals in its discretion may have concluded not to entertain jurisdiction of a claim for border city license fees against these carriers, when none was being asserted against other similar operators not parties, i. e., the Court may have thought the move smacked of penalization of respondents by petitioners for seeking the aid of a court of equity.

Any one of these reasons would have afforded adequate reason to support the affirmance.

C) **Equity Invests Petitioners With the Right to Maintain the Motion for Damages.**

This assertion is made, but no authority is cited to sustain it. It is argued that the State is entitled to the money, that the restraining order held up payment, therefore defendants are in equity entitled to recover it. Such argument (if it be assumed, as we deny, that the State or anyone is entitled to anything) is only to say "Respondents owe somebody, so why not let anybody sue them?"

On page 19 respondents suggest that the Public Service Commission "* * * is entitled to maintain on behalf of the State of Missouri, **the real party in interest**, the cause of action stated in the motion for damages." (Emphasis ours.)

If the State of Missouri is the real party in interest, it must bring the suit.

Rule 17—Rules of Practice in the District Courts of the United States.

This was likewise true under the old rules.

Rules of Practice in Equity, No. 37;
R. S. Mo. 1929, Sec. 698.

> "* * * all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, * * * or to enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary * * *"

must be brought **in the name and on behalf of the State.**

R. S. Mo. 1929, Sec. 11276.

It is said omission by plaintiffs to include the Treasurer of the State of Missouri as a party defendant implies they did not deem him "a right party to institute arrests against themselves for collection of license fees * * *" (Br. 19). That implication is correctly interpreted. The further inference, however, that thereby we concede he is not the proper party to maintain action to collect the fees, is indeed a tortured one. The yet additional inference then drawn, that the parties defendant (or some of them) necessarily **are** the proper persons to sue, is yet more tortured, and, in fact, wholly indefensible.

As illustrative of the proposition, we refer to

State ex rel. Winn, State Treasurer, v. Banks (Mo. Sup.), 145 S. W. (2d) 362.

There, to be sure, the state oil inspector endeavored to collect the tax (on gasoline, in that case). But when suit was filed, it was filed in the name of the State, at the relation of the State Treasurer.

The statute under consideration there required a distributor to "pay to the State Treasurer" a certain tax. So with R. S. Mo. 1929, Sec. 5272, here under consideration.

On page 20 respondents contend that the stipulation (R. 20) constitutes a voluntary recognition that "the

Public Service Commission is the right party to whom to pay the license fees in question.' The stipulation contains no such admission. In fact, no attempt was made therein by the Public Service Commission to assert the right to collect. It speaks, on the contrary (R. 20), of liability "to the State of Missouri."

The statement the plaintiffs "released" certain money to the Public Service Commission is deceptive. As a matter of fact, the checks were made payable to the State Treasurer. No respondent objected to this.

Despite the statement on page 20 that defendants below, as agents of the State of Missouri, can maintain the motion for damages, an agent of a disclosed principal may not in his own name sue a third party. Particularly is this true where rights are governed, as here, by specific statutes.

The attack (Br. p. 20) on the supplemental statement (R. 75) comes too late here.

Helvering v. Minn. Tea Co., 296 U. S. 378, 56 S. Ct. 269;

Virtue v. Creamery etc. Co., 227 U. S. 8, 33 S. Ct. 202.

No attempt to attack it was made before the lower court. None was made in the Circuit Court of Appeals. Indeed, in the first appeal to this court, it was treated as valid and proper. It is entitled to be accorded face value, and so the District Judge felt in approving it on January 7, 1939 (R. 26).

It is suggested (Br. p. 20) that the general denial did not attack the right of defendants to maintain the cause of action.

Plaintiffs, however, in filing the general denial, reserved the right to attack the counterclaim in any appropriate manner (Supplemental Statement, R. 75).

Furthermore, under a general denial, defendant (or plaintiff in case of a counterclaim) "* * * might prove any fact which went to show that plaintiff never had a cause of action against him."

Hoffman v. Parry, 23 Mo. App. 20, l. c. 29.

See, also:

Barr v. Lake, 147 Mo. App. 252, 126 S. W. 755, and Greenway v. James, 34 Mo. 328.

In closing this phase of the matter, we must refer to the statement that "all seventy-six of the plaintiffs violated" the stipulation. Elsewhere, the word "fraud" is used in this connection.

If violation there was, it was not knowingly done (Supplemental Statement, R. 75). It could not then be fraudulent.

Furthermore, numerous plaintiffs held interstate permits and licenses [R. S. Mo. 1929 as amended Sec. 5268, and General Order No. 33-A of the P. S. C. Rule No. 4 (f) (both appear in the Appendix)], authorizing operations in interstate commerce from and to all points in the State of Missouri, which permits and licenses, by the terms thereof, entitled those carriers to operate in the 10 and 20 mile zones in the conduct of border city operations.

D) Statutes Authorize the Public Service Commission to Collect License Fees.

Various statutes are cited which, by implication, are said to lodge with the Public Service Commission the capacity and duty to collect license fees.

It is first said that the duty to license necessarily implies the duty in the same agency to collect license fees. No authority is cited for this doctrine. It is certainly not the law in Missouri. As shown before in State ex rel. Winn, State Treasurer, v. Banks, supra, the licensing agent is not the collecting agent. Furthermore, suits to recover moneys due the State must be brought in the name of the State, and may not be prosecuted by the Public Service Commission.

R. S. Mo. 1929, Sec. 11276.

Indeed, the State Treasurer, by specific statute, has the duty to seek these fees.

R. S. Mo. 1929, Sec. 11425, provides that:

> "The state treasurer shall receive and keep, as provided by law, all the moneys of the state not expressly required by law to be received and kept by some other person; * * *."

Even if the inference petitioners draw were otherwise a fair one, it would not be permissible here. The State requires the Treasurer to collect fees not **expressly** required to be received by another. It does not except fees **inferentially** or by **implication** to be received by another.

Registration fees for motor vehicles likewise are payable to the State Treasurer.

R. S. Mo. 1929, Sec. 7761.

Instances of this nature could be multiplied. Suffice it to say we are unable to find a single instance in which the licensing authority can sue in its own name to collect the license fee.

A typical analogy is presented by the power of the police force. It has the duty to apprehend unlicensed drivers and to prevent the use of vehicles not properly

licensed under the law. It could not be seriously contended that therefore and by inference the police department could sue for and collect the fees. In fact, in the case of license fees and taxes asserted to be unconstitutional, the point is usually raised by injunction against the police authority to prevent interference with the operations of the plaintiff so asserting. It, of course, is not thereby conceded that that authority may collect the fee, or that the fee is payable to it.

It is sought, on page 22 (Brief), to establish the right in the Public Service Commission to **collect** fees because in certain instances it **fixes** fees. The delegation of incidental legislative functions as to fixing fees in no sense implies a further delegation of authority to collect them.

The deduction that the Public Service Commission can collect the fee where **it** fixes the amount, is a non sequitur in view of the premise that the Treasurer can collect the fee where **the Legislature** (directly) fixes the amount.

It is true the statutes discussed give certain power and authority to the Commission. However, nowhere is it purported to give to the Commission authority to collect license fees. In numerous sections of the statutes reference is made to the fact that the Commission shall have certain regulatory powers. The one section, however, that discusses **payment of the license fees** is silent as to the power or authority of the Commission. It says the fees shall be paid to the State Treasurer.

R. S. Mo. 1929, Sec. 5272.

Argument is made that this section provides merely that the Treasurer "shall receive the license fee"—an act consistent with the alleged right in the Commission to collect. Petitioners lose sight of the fact that this provision is subsequent to the affirmative provision of the stat-

ute (Appendix to Petitioners' Brief, p. 45). This provision requires that "* * * every motor carrier * * * **shall * * * pay to the State Treasurer of the State of Missouri, the annual license fee** as set out in this Act; * * *." (Emphasis supplied.)

It is said (Br. p. 24) the Commission **requires** that all checks be payable to the order of the State Treasurer. We say the requirement is that of the statutes and not of the Commission. Anent this discussion, would petitioners contend they could sue to recover on a check so payable if it were not honored?

Finally, of the argument about statutory implications, we say this: If the Legislature intended to empower the Public Service Commission to collect and to sue for the license fees, it would have been a simple matter to have so stated in the act. It was not attempted, expressly or by implication. In fact, the contrary purpose is clearly apparent.

E) The Public Service Commission Has Always Collected License Fees.

Rule 8, cited, provides for the payment of a fee in advance. It does not attempt to modify the statute as to the person to whom the fee is to be paid. The same is true of rule 13, mentioned on page 25.

We think the suggestion that the Treasurer does not have a representative present at every place a payment is due him is of little value. He should have to have, if such were the rule, a representative in every hovel, household, office or establishment, for the collection of some sort of tax or license fee.

Regardless of the above, the very rules of the Commission (appendix herein) themselves confirm this right in

the Treasurer and disavow it in the Commission. When speaking of a payment of the type the Commission can collect, provision is made for payment to the secretary of the Commission. However, when license fees are the topic, they provide for payment to the Treasurer.

Rule 5 deals with a docket fee on application for a certificate of convenience and necessity. It provides "the applicant shall pay to the secretary of the Commission a docket fee of five ($5.00) dollars." On the other hand, in dealing with a fee for license to be used by emergency vehicles (i. e., a fee under the general license fee provisions) it is provided in rule 23 "* * * there shall be paid to the State Treasurer of the State of Missouri an annual fee of $5.00 for each emergency vehicle * * *."

The implications of this are of additional force in view of the fact these rules were promulgated September 17, 1938, long after the counterclaim was filed. If the Commission felt or believed it had the right to sue for and collect license fees when the counterclaim was filed, it acted in a manner incompatible with that belief some months later, in promulgating these rules.

Finally, there is no merit in the argument that the rules establish the right to collect fees. The rule-making power of the Commission is subservient to its statutory powers.

F) Implied Powers of the Commission.

The previous argument is pursued further. What we have said above is equally pertinent here. We see nothing bearing on the question at issue, in any of the statutes cited. On the contrary, Section 5229, R. S. 1929, referred to, authorizes suits in the name of the State of Missouri, to enforce the powers of the Commission. It begs the question to assume collection of fees is one of the powers

of the Commission. And, if it were, the proceeding would have to be brought in the name of the State. This was not done. The citation defeats the purpose of petitioners.

The bill in equity contained no prayer to enjoin Public Service Commission from proceeding to collect the fees, as implied (Br. p. 28).

G) Eichholz Case Holds the Commission Is Proper Party to Maintain Action for Fees.

An analysis of the majority opinion affords no support for this contention.

The Court permitted the counterclaim to be considered because no objection was made. We quote from the opinion (supplying the emphasis, however), 23 Fed. Supp. 587:

> "Under Equity Rule 30, 28 U. S. C. A., following section 723, a defendant has a right to interpose a counterclaim 'arising out of the transaction which is the subject matter of the suit.' It is doubtful whether these claims arose out of the transaction which is the subject matter of the suit, and yet, because of the injunction, the plaintiff elected to discontinue the payment of fees.
>
> "**No objection having been made to the filing of the counterclaim, this court will not interpose one** under the circumstances of the case. The question having been presented, it should be considered by us."

In the instant case respondents reserved the right to challenge the counterclaim on any ground (R. 75). Since upon trial of the main issues in the suit it might devlop that the issues of the counterclaim became moot, it seemed to be unnecessary to launch full attack on the counterclaim at the outset.

The opinion of Judge Otis shows his viewpoint. This, from the above quotation, seems to have been concurred in by the majority, even though, in the absence of objection, they entertained the counterclaim.

The Otis opinion on this phase of the case says (l. c. 599):

"Defendants have asked leave to file a counterclaim. The plaintiff, it is alleged, owes the state fees for the use of the highways, which fees it has not paid. It is sought to recover them by this counterclaim. There are two reasons why I think the counterclaim should not be permitted to be filed, although I have little doubt that the fees sought are owing.

"Equity Rule 30, 28 U. S. C. A., following section 723, authorizes (1) a 'counterclaim arising out of the transaction which is the subject matter of the suit.' Also it authorizes (2) a 'counterclaim against the plaintiff which might be the subject of an independent suit in equity against him.' Two classes of counterclaim are thus provided for. Moore v. Cotton Exchange, 270 U. S. 593, 46 S. Ct. 367, 70 L. Ed. 750, 45 A. L. R. 1370. But obviously the counterclaim sought to be asserted here does not fall in class (2); it could not be made the subject of an independent suit in equity. (It might be made the subject of a suit at law.) Does it arise out of the transaction which is the subject matter of the suit?

"It is said in the opinion of the majority that it is doubtful if this counterclaim 'arose out of the transaction which is the subject matter of the suit.' I should go further in the same direction and say that it is certain the counterclaim does not arise out of the same transaction. What was 'the transaction' which is the subject matter of this suit?

"The Public Service Commission revoked or threatened to revoke the plaintiff's interstate permit and threatened then to prevent plaintiff operating without an interstate permit. The suit arises out of the withdrawal or threatened withdrawal of the permit

and consequences incident to that withdrawal. The right to fees arises out of the use of the state's highways by plaintiff. Certainly the (a) withdrawal of the right to use the highways and (b) the use of the highways are not the same thing, not the same transaction. They are scarcely comparable, but, if comparable, they are not comparable as resembling one another, but as opposites.

"It is true that the plaintiff is operating under our temporary injunction. Because he is operating he owes fees. It may be said then that the counterclaim arises because of the injunction, and that the injunction arose from the threatened withdrawal of the interstate permit. That, however, is a connection quite remote between counterclaim and 'transaction' and not the immediate connection which the rule requires.

"My second reason for believing this counterclaim should not be entertained is this: If plaintiff owes fees for the use of the highways of the state he owes them to the state or to the state treasurer for the state. Sec. 5272, R. S. Mo. 1929, Mo. St. Ann., Sec. 5272, p. 6689. He does not owe them to the Public Service Commission whose members are the defendants in this case. Nor have I found any statute authorizing the Commission to sue for such fees as the agent of the state.

"In my view a permanent injunction should issue and leave to file the counterclaim should be denied."

We do not undertake to tell this Court what it decided on this issue. It appears to us, however, that the Court was careful to preclude the possibility of a decision as to the counterclaim. In Eichholz v. Public Service Commission, 306 U. S. 268, l. c. 269, the Court said the decree as regards the counterclaim was not a final one. Hence, of course, it was not here for review.

In concluding the opinion, l. c. 275, the Court, lest there be doubt about it, ruled, "The decree of the District

Court, **so far as it denies an injunction,** is affirmed." (Emphasis supplied.)

The statement is made on page 31 (Brief) that this Court upheld the jurisdiction of the Three-Judge Court to allow the Public Service Commission to maintain the counterclaim. The foregoing anlaysis would appear to refute the statement.

Next the inference is drawn that since it was the duty of this Court to reverse the action of the Three-Judge Court on the counterclaim if the Public Service Commission could not maintain the action, therefore, from the failure to reverse, must be deduced a finding of power in the Public Service Commission to sue. Since the counterclaim was not before the Court, the failure to reverse and remand the action with reference to it, of course, gives rise to no inference of the nature suggested.

H) Attorney-General Also May Maintain Action to Collect Fees.

Respondents cite Section 11276, R. S. Mo. 1929.

That section, to be sure, authorizes the Attorney-General to institute suits to enforce rights of the state. But it is to be noted he is authorized to do so in his capacity of legal representative, i. e., as counsel, not as party litigant. The statute says, in part:

> "The Attorney-General shall **institute, in the name and on behalf of the state,** all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary." (Emphasis supplied.)

The cases cited at the top of page 32 sustain the position respondents take on the matter. In each of them the State itself, and not the Attorney-General (or Prosecuting Attorney), is the party litigant. The very style of the case, the caption, in each instance, is revelatory in that respect.

We conclude this section of the brief with this commentary.

While loudly asserting the motion for damages was properly brought by the defendants (all of them), the brief attempts to justify that right on the part of but two of them, the Public Service Commission and the Attorney-General. Thus it is, in effect, conceded that the other defendants could claim no right to sue. In the circumstances, the counterclaim will not lie, because of the defect of parties (it was filed before the present rules were in effect).

Plaintiff may not use the counterclaim or cross suit to introduce new parties, be it the State Treasurer or the State itself.

Rules of Practice in Equity Nos. 30 and 31;
Simpkins, Federal Practice, 1934 Edition, Section 708.

If the counterclaim was bad under the then existing Rules of Equity Practice, the Three-Judge Court was justified in dismissing it. If that ruling was correct when made, the later promulgation of the Rules of Practice in the District Courts would not vitiate the decision. This is true even though under the practice rules the Court might have viewed the matter differently. The new rules do not create or recreate a cause of action which had terminated or expired under the old.

McCrone v. United States, 300 U. S. 276.

II.

A) **Preliminary Discussion.**

First it is said that the arguments of point I sustain point II. The argument comes to this. If a certain element among several, the absence of which is fatal to the counterclaim, is found to be present, the failure to sustain the counterclaim (or motion for damages) is an abuse of discretion. True, if the person who has the right to sue is not prosecuting the claim, the defect is fatal. But the discretion of the Three-Judge Court goes far beyond determinations as to parties. The cases dealing with discretion to retain or remit ancillary litigation do not have such a narrow ambit, as will be seen.

The net result of point A is this hypothesis. If parties were such that the Court could decide in petitioners' favor, failure to do so is an abuse of discretion. The next step would be that any exercise of discretion resulting in a refusal to assume jurisdiction is an abuse of discretion. That is tantamount to saying that the Three-Judge Court has discretion concerning treatment of the counterclaim, only provided it exercises that discretion in the particular way for which petitioners contend—the reductio ad absurdum.

B) **Did the Three-Judge Court Abuse Its Discretion by Overruling the Motion for Damages?**

Here again we advert to the fact that petitioners, having said in point I that the Three-Judge Court **decided** the counterclaim (Brief 16 and 17) on the issue of parties, now urge that it abused its discretion in dismissing the counterclaim **without deciding** it. It is not clear, therefore, whether the "abuse" complained of lies in the failure to decide the counterclaim on the merits, or in the

alleged act of deciding it on its merits, but in a manner adverse to petitioners' desires.

The argument about rights in equity is again advanced. It, in effect, reasons that since equity enjoined defendants from forcing plaintiffs to pay the State Treasurer, equity therefore owes those defendants a correlative duty, that of forcing plaintiffs to pay to defendants what plaintiffs might otherwise have paid to the Treasurer. The Treasurer is, of course, not a party to the proceedings. There seems to respondents to be no equity in that. No authorities support the viewpoint.

On the subject of equity we remind petitioners that the normal method of suing to collect taxes is by individual suit against individual taxpayer in which he makes his personal defense and has the benefit of a trial by jury. Can it be so shocking to the conscience, so inequitable, that petitioners here, or the proper state functionary, should so proceed? The fallacy of the position of petitioners is this: They are not put to disadvantage by the decision. It but prevented them (or the proper authority) from having an unusual and extraordinary short-cut in the performance of usual and ordinary tax collecting functions. Had the state authority been permitted to ride herd over defendants in the collection of taxes, "equity" might well have been lacking. To be "remitted" to normal and usual rights cannot be branded as mistreatment.

It is said (Br. p. 33) the State is relegated to seventy-six different causes in many different forums. Again, we say the State is not relegated anywhere. There is no compulsion on it further to pursue these carriers any more than any other carriers similarly situated. The petitioners appear to feel no compulsion to harass the latter.

As to the talk of different forums, if the amounts in-

volved justify references made in the brief, the State or State Treasurer, pursuant to the Rules of Practice in District Courts of the United States, No. 20, may proceed against all nonresident respondents in **one court** and in **one proceeding**. Furthermore, they are all amenable to service by the simple expedient of serving process upon the secretary of the Public Service Commission.

R. S. Mo. 1929 (as amended), Sec. 5279.

In view of the foregoing, it will be seen that the State is not relegated or sent anywhere. If it chooses voluntarily to pursue these parties further, it can do so in the local courts, as to citizens of this State (exactly as it must proceed against carriers not party to the litigation—exactly as it would have been required to proceed but for the litigation). As to nonresidents, it can proceed against them in one action in a federal court within this very State and forum. The argument of petitioners is without basis in fact. There is no real hardship visited on them.

It follows that the claim of abuse of discretion, because of the supposed hardship, falls to the ground.

C) **Discussion of Applicable Decisions.**

(1) **United Motors Service, Inc., v. Tropic-Aire, Inc.**, 57 Fed. (2d) 479, is discussed. It is said that the case is distinguishable because there was but one plaintiff there to be proceeded against in a separate suit elsewhere. There was no such factor as many suits in many forums to which the defendant was remitted.

Argument under the preceding paragraphs show that the supposed distinguishing element is not present in this case. But, also, it is true that the discretion to hear or not to hear auxiliary matter is not dependent upon such considerations. No case is cited which considers that element.

No doubt, were the situation assumed to exist (the necessity of many suits in numerous forums), actually present it could be considered by the Three-Judge Court as an element affecting the discretionary judgment of the Court. But the argument is a two-edged sword. The Court might be impressed by consideration of the **rights** and **interests** of plaintiffs as strongly as by consideration of the **desires** and **conveniences** of defendants.

On page 39 the argument is renewed that the law-violating foreign carriers may come in swarms, violate our law, receive the protection of a federal injunction and then scurry back to their various foreign residences.

If they come in swarms, the police powers of this Commission enable it to choke off the traffic any moment. If they violate the law, they are immediately amenable to arrest, fine, and what is even more effective, stoppage. If these carriers seek injunctive relief without joining the State Treasurer, he can sue them for license fees. If they join the Treasurer, he may counterclaim for them. In both instances this can now be done in one forum and in one action.

Rules of Civil Procedure for the District Courts Nos. 18, 19, 20 and 22.

In view of the rights accorded by these rules and in view of the fact that the Three-Judge Court did not dismiss the counterclaim and motion for damages on the merits (only without prejudice), discussion about petitioners not having their day in court seems superfluous. Were the case dismissed on the merits, as a finality, it might be urged petitioners did not have their day in court. They are still entitled under the order, if so advised, to proceed by independent suit. They thus may, if they desire, have their "day in court." That, however,

seems not to be petitioners' real grievance. They really desire not a day in court before a competent tribunal with an opportunity to be heard, the elements of due process. They desire to choose the court, and the day and the circumstances (they seem to prefer a Master to a jury).

On page 35 it is suggested that the Court, by its indifference and abuse of discretion (if this case is affirmed), will have contributed to respondents' unjustified financial "victory." We cannot refrain from suggesting, with Pyrrhus, that one more such victory over the Romans and we are utterly undone.

A further distinction between the instant case and the Tropic-Aire case is said to exist in this; that affirmative relief in that case is not asked in the pleadings. We find no basis for this distinction. In the instant case a motion for damages was filed after the main issues had been ruled. In the Tropic-Aire case plaintiff secured an order on defendant to show cause why plaintiff's motion to dismiss its bill of complaint should not be granted. Defendant made response to this, alleging that dismissal should not be permitted until defendant's loss and damage should be assessed and paid. Defendant presented a request and order "that the defendant recover of the plaintiff and sureties on the injunction bond such damages as defendant has suffered by reason of the issuance of said injunction." Reference to a Special Master was also sought as in the instant case (57 F. [2d], l. c. 480).

The entire subject of discretion with reference to auxiliary matters in injunction suits was fully considered in the Tropic-Aire case. Nowhere can we find a more complete and learned treatise on the subject. Accordingly, we quote at length (l. c. 484 et seq.):

"(7) Defendant argues that it had the **right** to

have the trial court assess its damages in the equity action. While the **power** unquestionably exists in the trial court to assess such damages, it was clearly discretionary with that court to retain the case and in an ancillary proceeding as incident to the main case determine such damages or leave the parties to an action at law. There is no duty on the trial court to wind up the matter of damages in the equity suit. In the leading case, Russell v. Farley, supra, the court said with reference to this, page 446 of 105 U. S., 26 L. Ed. 1060:

> "'But whilst the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet if it has that power, it is in the discretion to exercise it, or to leave the parties to an action at law. No doubt in many cases the latter course would be the more suitable and convenient one. * * *
>
> "'But the appellants contend that, even if the court had the power to pass upon the question at all, its decision was erroneous, and ought to be reversed on the merits. On this point, the judgment of the court approaches so near to an exercise of discretion, that we should require a very clear case to be made in order to induce us to reverse it. The conduct of the parties and the course of litigation in the court below pass so directly under the inspection of that court, as to give it many advantages which no other court can possess, for forming a correct decision on the question, whether any extra damages should be allowed for the issuance of the injunction.'

"In Baker & Bennett Co. v. N. D. Cass Co. et al., 224 F. 439, 440 (C. C. A. 2d), the appellate court refused to interfere with the discretion exercised by the trial court in refusing to assess the damages in the equity suit as demanded by defendant. It held that on dissolution of the preliminary injunction, for which a bond was given, the court had the discretion to determine the liability thereon or to leave the de-

fendant to his remedy by an action at law. We quote from that decision as follows: 'We do not understand that Judge Lacombe, in denying the petition for the appointment of a special master, intended to hold that the defendants were not entitled to recover at all, but only to exercise the discretion that lay in him to say whether the liability upon the bond should be determined in an ancillary proceeding in this cause or in an independent action at law.'

"In Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, 279, 37 S. Ct. 283, 286, 61 L. Ed. 715, Ann. Cas. 1918 C, 1147, the Supreme Court in discussing whether a court of equity had jurisdiction to render summary judgments on a bond because there might be an adequate remedy at law, and holding that such objection is not good and that a court of equity having complete jurisdiction will dispose of all incidents to the case and end further litigation, says: 'The objection that a court of equity has no jurisdiction because there is an adequate remedy at law on the bond is not well taken. A court of equity, having jurisdiction of the principal case, will completely dispose of its incidents and put an end to further litigation.' The latter sentence is of course merely dictum.

"On the general question of the power of courts of equity to retain the case and assess damages, see Lea et al. v. Deakin (C. C.), 13 F. 514; Coosaw Min. Co. v. Farmers Min. Co. et al. (C. C.), 51 F. 107; Tyler Min. Co. et al. v. Last Chance Min. Co. (C. C. A.), 90 F. 15; Leslie v. Brown et al. (C. C. A.), 90 F. 171; Cimiotti Unhairing Co. et al. v. American Fur Refining Co. et al. (C. C.), 158 F. 171; Nashville C. & St. L. Ry. v. Railroad Commission (C. C.), 171 F. 223; Mississippi Valley Fuel Co. et al. v. Watson Coal Co. (C. C. A.), 202 F. 122; Williams v. O'Toole (C. C. A.), 211 F. 484; Bellamy v. St. Louis, I. M. & S. Ry. Co. (C. C. A.), 220 F. 876; Baker & Bennett Co. v. N. D. Cass Co. et al. (C. C. A.), 224 F. 439; United States Fidelity & Guaranty Co. v. Burke et al. (C. C. A.), 238 F. 881, Ann. Cas. 1918 C 93; Martin v. Barth et al.

(C. C. A.), 25 F. (2d) 95; Owl Creek Coal Co. v. Big Horn Collieries Co. (D. C.), 36 F. (2d) 485; Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, 37 S. Ct. 283, 61 L. Ed. 715, Ann. Cas. 1918 C 1147.

"Many courts of original jurisdiction have laid down rules with reference to this matter and have regarded it as the better practice for the court in the equity suit to determine the damages. For instance, in Owl Creek Coal Co. v. Big Horn Collieries Co. (D. C.), 36 F. (2d) 485, the court reviews many of the federal decisions upon the subject and states that defendant may in an ancillary proceeding summarily enforce a bond against the surety, and that the defendant ordinarily will not be remitted to his remedy at law. Same doctrine Lea v. Deakin (C. C.), 13 F. 514.

"We think there can be no well-considered authorities cited holding that under the circumstances such as here presented there was no discretion in the trial court to hold the case and assess the damages or to relegate defendant to an action at law on the bond and that it must prior to granting dismissal settle the question of damages. It makes no difference that certain courts have expressed their opinion that discretion should be exercised in one direction rather than the other or that perhaps better reasons appear for choosing the alternative followed than may be available in the instant case. There is no particular reason why defendant should have the right to have the damages assessed in the equity suit instead of in an action at law because he may consider one alternative better for it than the other. While a master in equity and a jury at law might differ as to the damages, the proceedings are supposedly equally effective. The argument that greater damages could be assessed in the equity suit proper we have shown to be unsound. The refusal of the District Court to assess damages under the injunction bond in the equity suit proper as requested by the defendant was not an abuse of discretion."

To sum up. We grant that the Three-Judge Court in a proper case, and with proper parties, has the **power** to retain ancillary matter. That does not militate against its **right**, in the exercise of discretion, not to entertain such matter. Nor does it give the parties the right to insist on such retention.

After exhaustive search, the Court in the Tropic-Aire case found no well-considered authorities holding that the lower court did not have discretion to leave the parties to their rights elsewhere concerning damages (l. c. 485). Petitioners likewise have been unable to find such. Respondents also.

(2) The Eichholz case is discussed elsewhere.

(3) **Russell v. Farley, 105 U. S. 433,** is cited in support of petitioners' contentions concerning the alleged rule regarding summary action on injunction bonds in the primary court.

Russell v. Farley, however, concedes the general rule to be to the contrary, but holds merely that the injunction court **may** have the damages assessed under its own authority.

The opinion also establishes the fact that the Court has the **power** to order the incidents to be disposed of elsewhere. We quote from the same paragraph petitioners quoted, 105 U. S., l. c. 446:

> "**But whilst the Court may have** (we do not now undertake to decide that it has) **the power to assess the damages, yet if it has that power it is in its discretion to exercise it or to leave the parties to an action at law.** No doubt in many cases the latter course would be the more suitable and convenient one." (Emphasis ours.)

The case upholds the action of the Three-Judge Court in all respects. The action of the Circuit Court of Appeals in affirming the ruling likewise presents no conflict with Russell v. Farley.

Of course, the opinion, rendered in 1882, could not have envisioned the situation created by the passage of Section 266, Judicial Code (28 U. S. C. A. 380), years later.

(4) **Inland Steel Co. v. U. S., 306 U. S. 153.** The foregoing comment on Russell v. Farley, supra, pertains as well to the Inland case.

(5) **Owl Creek Coal Co. v. Big Horn Collieries, 36 F. (2d) 485,** a district court case, goes no farther than the rest. It holds that the trial court **may,** in its discretion, retain the case, or it **may,** in its discretion, remit the parties to other proceedings.

At the bottom of page 37, petitioners (inadvertently, no doubt) themselves give recognition to the true rule. They say that by its order the Court "* * * acted in conflict with the uniform rule in all circuits, **permitting** the Court, **in its discretion,** to render judgment for damages on the injunction bond * * *." (Emphasis supplied.)

If petitioners really recognize and concede this to be the true rule, there is no disagreement between us. Nor is it of consequence, in considering the **existence** of discretion vel non in which way the courts may "favor" exercising it.

(6) **Camp v. Boyd, 229 U. S. 530,** states a broad general principle in circumstances which present no analogy to the instant situation.

(7) **Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273,** is cited. That case dealt with summary judgment

against sureties on an **appeal** bond, and hence is not apposite. It does not hold that the Court, even in such circumstances, may **not** remit the parties elsewhere for relief.

The quotation from the opinion, we deduce from the use of italics, is chiefly to emphasize this statement, "a court of equity, having jurisdiction of the principal case, **will completely dispose of its incidents and put an end to further litigation.**"

"The latter sentence is, of course, merely dictum," said the Court in the case of

United Motors Service v. Tropic-Aire,
57 Fed. (2d), l. c. 485.

In concluding consideration of this doctrine, we reiterate no case is shown where the discretionary right to remit the case elsewhere was denied. Cases distinctly stating this right in the affirmative are, of course, rare. And the reason is obvious. So well established is the rule that no one can controvert its existence. Few have had the hardihood to try. Instead, all have recognized that right as a premise. Some have urged the existence of a correlative right and power in the injunction court, in the exercise of its discretion, to entertain the motion for damages itself. Hence the cases petitioners cite.

D) **Equity Will Do Complete Justice.**

We concede the general proposition to be sound. More frequently it is stated that equity having jurisdiction of a cause **may** retain jurisdiction to award complete relief.

(1) **Sterling v. Constantin, 287 U. S. 378,** is cited. The case and the quotation have no bearing here. No counterclaim was involved. It holds that a Three-Judge Court,

having properly obtained jurisdiction under the statute, could deal with pertinent questions of law arising under the State Constitution and statutes, as well as under the federal law.

(2) The second case here noted is **Railroad Commission v. Pacific G. & E. Co., 302 U. S. 388.** As the quotation indicates, this case holds that the Three-Judge Court having jurisdiction was not confined to consideration of federal law, but could consider points of local law involved. There was no counterclaim.

(3) The third case is **Sovereign Camp v. Murphy, 17 Fed. Supp. 651.** This was another case in which it was held that the Three-Judge Court, its jurisdiction properly invoked, had authority to try the entire case presented by plaintiff, including issues not involving constitutional questions.

(4) It is said equity courts will do complete justice, likewise, in cases involving counterclaims.

Lehman v. Krentler etc. Co., 284 U. S. 448, cited here, was a contempt proceeding for violation of an injunction against patent infringement. The Court was not a Three-Judge Court. It was said that plaintiff, by bringing the suit, submitted to the jurisdiction of the Court all issues embraced in the suit, including the counterclaim. That was no more than to say that in the instant case the Three-Judge Court had authority and power to consider the counterclaim. It did so, and, in its discretion, dismissed the same.

Young Co. v. McNeal-Edwards Co., 283 U. S. 398, next cited, dealt with a Massachusetts statute concerning non-residents bringing suit in that state. They were required to answer in an action brought by the opposite part involving the same subject matter. It was held that the

Massachusetts statute was enforceable in the federal court. No counterclaim was involved. A separate suit was under consideration.

(6) **Chicago etc. Ry. Co. v. Lindell, 281 U. S. 14,** is quoted. The case is not a Three-Judge Court case (true, likewise, of the McNeal-Edwards case, supra). Also the "pernicious" result inveighed against there could not occur here. This was discussed in connection with the argument that swarms of law violators could intrude with impunity and scuttle away again without penalty.

E) Abuse of Discretion to Disallow Expenses of Defense.

Pertinent parts of the motion for damages are quoted in the statement. They show that the motion sought **license fees** as the sole "damages." The answer, then, to this charge is clear. **The motion nowhere sought the allowance of "expenses."**

There is this additional circumstance. Petitioners, Public Service Commission and Attorney-General, undertook to preempt the field. They exhausted their rights by filing the motion for costs (R. 73). This motion was abandoned. No attempt was made to preserve the point. It is a dead issue and would be, likewise, even if "expenses" had been included in the motion.

The contention is probably urged in an efforts to show some dissimilarity between the object of the counterclaim and that of the motion for damages. That, in turn, to furnish basis for claiming, therefore, that not all the subject matter of the latter was ruled on in connection with the former.

This, and the discussion about costs, appear to lack forthrightness.

Viewed as a motion for costs, even, the motion for damages would still be ineffectual since it was not filed during the judgment term.

32 C. J. 442;
Fears v. Riley, 147 Mo. 453, 48 S. W. 828;
Joplin State Bank v. Heaton (Mo. App.), 180 S. W. 19.

In petitioners' brief in the Circuit Court of Appeals the same point was asserted and later abandoned.

III.

Duty to Remand Motion for Damages to District Judge.

It is not here asserted that there is such a duty. A duty is suggested by way of rhetorical question.

Petitioners here (p. 41), refer to their treatment of the subject in the summary (p. 13).

If there is merit to the suggestion, let us first see if petitioners may raise it now. To begin with, the "rule," if it exists, requires the Three-Judge Court, **upon presentation of the facts** by the parties, to remit the ancillary matter to the District Judge.

No oral or written motion was ever made or other action taken in the lower court by way of "presentation of the facts" warranting such remission or suggesting the propriety of it.

The contention was not set forth in the petition for rehearing there (R. 63). The motion for damages was filed to the full Three-Judge Court (R. 79). It was ruled on by the Three-Judge Court as such (R. 83). No suggestion of the "rule" or "presentation of the facts" was contained in the motion to set aside the order overruling motion for damages (R. 83). That, in turn, was ruled by

the Three-Judge Court as such, without objection or exception by petitioners (R. 89).

The Brief filed here on the direct appeal was barren of such suggestion. No error was assigned for failure to remit to the District Judge in that appeal (Public Service Commission v. Brashear etc. Co. et al., 306 U. S. 204). Nor was such an assignment of error made in the appeal to the Circuit Court of Appeals (R. 95). (See, also, Brief of Appellant in Circuit Court of Appeals.)

These other courts were justified in not considering action or nonaction as to matter not urged.

This Court should not disturb the judgment below in view of the untimely obtrusion of the point. Petitioners may not for the first time raise new matter in their petition for certiorari.

Helvering v. Minn. Tea Co., 296 U. S. 378, 56 S. Ct. 269;
Virtue v. Creamery etc. Co., 227 U. S. 8, 33 S. Ct. 202.

It is not seen how the result would have been different had the motion for damages been remitted to Judge Collet. His concurrence in the order overruling the motion for damages establishes his view on the subject. He, if the sole Judge, would have dismissed the counterclaim and overruled the motion, precisely as he voted to do and concurred in doing on the record presented.

Of course, this rule, as envisaged by petitioners, posits only a remission to the District Judge for proceedings "independently of Section 266 of the Judicial Code." The "rule" does not force him then to assume jurisdiction. He would have the same discretion as the Three-Judge Court, to hear the matter or "relegate" the parties elsewhere.

Indeed, most of the cases petitioners cite in discussing the subject of discretion dealt with decisions of one Judge and were not Three-Judge cases.

It would be a futile act now, if it were determined that such a rule existed, to refer the motion to Judge Collet, since he would no doubt rule, as before he joined in ruling, that the counterclaim or the motion should be dismissed without prejudice.

Two additional comments are appropriate here.

Again, petitioners say it is unimportant to them whether the matter is before the Three-Judge Court or the One-Judge Court. Still, they take no position relative to the question they ask.

Petitioners again talk about their day in court. This suggestion loses sight of the fact the order dismissing the counterclaim did not foreclose action elsewhere.

It is said the Brashear case prevents a direct appeal to this Court on a counterclaim, if the injunction issue is not appealed. And it is said that Columbia Terminals v. Lambert, 309 U. S. 620, establishes the principle that **the Supreme Court will dismiss outright a direct appeal on a counterclaim,** if the injunction issue **is** appealed.

If petitioners have correctly analyzed the latter case, here is a recent and binding precedent governing the case at bar. This Court, on the authority of the Columbia Terminals case, should dismiss the petition for certiorari, and affirm the action of the Circuit Court of Appeals.

Respondents have no objection to the enunciation of a clear rule as petitioners advocate (Brief 43). It should be, however, a rule to operate **in futuro** so as not to disturb respondents' rights correctly ruled on below.

We believe petitioners have not shown that they were unjustly treated elsewhere. We believe their brief does not make a case of a just grievance. Accordingly, the action below should be affirmed, regardless of the desirability of establishing a rule of procedure in such matters.

Finally, it is urged that petitioners were discriminated against, inasmuch as appealing parties in other cases were saved by the Court from the consequences of improvident wrong appeals.

That, of course, is a matter for consideration in those particular cases, and could have been urged in a request for rehearing in the direct appeal.

Whether this Court saves some appellants and not others from the effects of inadvertence is not to be considered when determining whether or not the Circuit Court of Appeals ruled correctly on the record presented to it. That, strictly speaking, is not part of the record before the Circuit Court of Appeals, and hence not part of the record here.

After all, petitioners' real objective seems to have been to have this matter heard in this court. This objective they have attained. They should not now be heard to complain on that score.

The judgment of the Circuit Court of Appeals, we earnestly urge, should be affirmed.

Respectfully submitted,

KENNETH TEASDALE,
B. W. LaTOURETTE,
PAUL G. KOONTZ,
Attorneys for Respondents.

BLANK PAGE

APPENDIX.

General Order No. 33-A of the Public Service Commission.

Rule No. 4 (f). If applicant proposes to operate over an irregular route, there shall be a statement showing the stand or location from which, and the territory within which, applicant proposes to operate, and the proposed tariff schedule or schedules showing the rates, fares and charges proposed to be made for the contemplated service.

Rule No. 23. Emergency Vehicles.—Provisions for and How May Be Used.—Every motor carrier at the time of licensing a motor vehicle, trailer or semitrailer may elect to have described on his or its annual license card two emergency vehicles of weight carrying capacity not greater than that of the licensed vehicle. Either of such described two emergency vehicles will be allowed to operate or be used in lieu of the licensed vehicle, as emergency. Only one of such three vehicles as shown on the annual license card may be operated in the State at any one time; and when either of the emergency vehicles shown on the annual license card is being operated it must carry the annual license card as provided by this Rule of order herein. Upon the issuance of the annual license card above described if the licensed carrier elects to describe one or two emergency vehicles as provided for above, there shall be paid to the State Treasurer of the State of Missouri an annual fee of $5.00 for each emergency vehicle described in the aforesaid annual license card.

R. S. Mo. 1927, Sec. 5268. A motor carrier not operating over a regular route may, within the territory permitted to be served by him, receive persons or property at a point located on a regular route and destined to a point not located on a regular route, and receive persons or property at a point not located on a regular route and destined to points on a regular route.

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 23 1941
CHARLES ELMORE CROPLEY
CLERK

No. 549.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI et al.,

Petitioners,

vs.

BRASHEAR FREIGHT LINES, INC., et al.,

Respondents.

PETITION OF RESPONDENTS FOR A REHEARING.

KENNETH TEASDALE,
B. W. LaTOURETTE,
St. Louis, Missouri,
PAUL G. KOONTZ,
Kansas City, Missouri,
Attorneys for Respondents.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

BLANK PAGE

INDEX.

	Page
Petition of respondents for a rehearing	1-8
Questions for consideration:	
1. Should the two additional judges, called to assist the District Judge pursuant to section 266, have participated in consideration of the motion to assess damages?	1, 2
2. Was the District Court correct in holding that its prior denial of the counterclaim was a final adjudication of the issues presented by petitioners' motion to assess damages?	2
3. Were the enjoined Missouri officials and agencies, to whom the injunction bonds ran, proper parties to invoke the Court's action for assessment of damages?	2, 3
4. Did the District Court erroneously exercise its discretionary power, by its refusal to hear and determine the merits of petitioners' motion to assess damages?	2, 5
Conclusion	6

Authorities Cited.

R. S. Mo. 1929 (as amended), Sec. 5279	5
Simpkins, Federal Practice 1938, Sec. 818 et seq.	3

BLANK PAGE

No. 549.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI et al.,

Petitioners,

vs.

BRASHEAR FREIGHT LINES, INC., et al.,

Respondents.

PETITION OF RESPONDENTS FOR A REHEARING.

Come now the above-named respondents and present this, their petition for a rehearing of the above-entitled cause, and in support thereof respectfully show:

The opinion of the Court set forth four questions to receive consideration, as follows:

1. Should the two additional judges, called to assist the District Judge pursuant to section 266, have participated in consideration of the motion to assess damages?

2. Was the District Court correct in holding that its prior denial of the counterclaim was a final adjudication of the issues presented by petitioners' motion to assess damages?

3. Were the enjoined Missouri officials and agencies, to whom the injunction bonds ran, proper parties to invoke the Court's action for assessment of damages?

4. Did the District Court erroneously exercise its discretionary power, by its refusal to hear and determine the merits of petitioners' motion to assess damages?

We shall refer to these in order.

1. Respondents have no complaint to urge concerning the action of the Court or the discussion of the opinion on this point.

2. The opinion holds that the judgment dismissing the motion for assessment of damages cannot be supported upon the ground that the issues raised by it had been adjudicated by the prior dismissal of the counterclaim. As grounds for this ruling the Court asserts, "Some of the damages asserted in the motion—such as the costs of the litigation—were not asserted in the counterclaim."

There is no type of relief sought in the motion for damages which is not sought in the counterclaim. The Court has evidently overlooked the fact that prior to filing the motion for damages petitioners filed a "Motion of Defendants for Costs" (R. 73). This was filed September 15, 1938, whereas the motion for damages (R. 79) was not filed until May 22, 1939.

The situation, then, is this: It is asserted that the motion for damages includes subject matter beyond the purview of the counterclaim. A perusal of the motion for damages (R. 79 et seq.) shows that it seeks only to assess license fees and costs. It does not by its terms purport to seek

expenses of litigation, etc. If, by costs, it is meant as petitioners urge, expenses of litigation, it can be answered then (1) the motion for damages did not seek them; (2) that field was preempted by petitioners' motion for costs (R. 73).

If, on the other hand, by "costs" is meant the ordinary and usual costs of litigation, the motion presents nothing new, because such costs follow as a usual incident to the decision of the case (Simpkins, Federal Practice 1938, sec. 818 et seq.).

Accordingly, it seems that the District Court was correct in assuming that no type of relief was sought by the motion for damages not contained in and hence ruled upon in the ruling on the counterclaim.

It follows that the District Court was correct in dismissing the former as having already been ruled in the case of the latter.

Respondents believe that if the Court considers the motion of defendants for costs and its effect upon the question for consideration it should revise its opinion with reference to the second question. Respondents respectfully so urge.

3. The opinion holds that respondents were proper parties to invoke the Court's action for the assessment of damages. This appears to be based in part upon the assumption that the Missouri Attorney-General is given exclusive authority to bring suit in the name and on behalf of the State. That is true. But the opinion overlooks the fact that he is given this authority to do so as **counsel**, not as **party litigant**. It is submitted, a court cannot with propriety render a judgment in favor of a client himself not a party merely because one authorized to serve as the client's attorney is a party litigant. It would appear that this issue and the effect of this statute could well be left for the trial court to consider.

It is said that respondents are in a poor position to argue that petitioners are not proper parties for this purpose, for one of the grounds upon which the injunction was sought was that these particular petitioners were threatening to bring actions against respondents to collect these fees. The petition for injunction did not seek to enjoin the State Treasurer, nor did it seek to enjoin the collection of license fees. What it sought to enjoin (R. 17) was actions to collect penalties, and the institution of criminal actions under the Missouri Bus and Truck Act.

It is also stated in the opinion that respondents executed bonds running to the enjoined officials in which they agreed to pay the damages suffered. Obligation of a bond to the defendant in an injunction suit should not be stretched by implication to cover an entirely different type of damage to another person, the State Treasurer, not a party to the litigation.

If it be said that the stipulation (R. 20) had the effect of broadening the restraining order, we have this situation. The Court would then be deciding an issue of law and fact without presentation or consideration of evidence. Respondents urge and feel that they can prove, if given opportunity before the trial judge, that the stipulation does not and was never intended to include border city fees (R. 76). If respondents are correct in this, there was no damage suffered by petitioners or the State Treasurer or the State.

It is only by assuming the stipulation covered border city operations, i. e., that respondents are in error, can it be said that damage was suffered, as all other fees were paid. Respondents should have an opportunity to present the evidence and show the circumstances to the trial court. Respondents feel that the purport of the opinion, in effect, constitutes a decision of the issue on mere argument in this court.

This fundamental issue should, we earnestly urge, be left for consideration with proper proof of fact and circumstances, for the trial court. The proof, we may add, will be voluminous, consisting of letters, documents, conversations, and other evidentiary matter.

4. It is here held that the District Court (or the Three-Judge Court) erroneously exercised its discretionary power by refusing to hear the merits of petitioners' motion to assess damages. The Court so ruled because it is said that petitioners might have to bring separate actions against each of the seventy-six respondents, and might have to sue some of them elsewhere than in the State of Missouri.

It is said there is a controversy on the point. The mere fact that petitioners controvert the true situation should not justify reversal of the Circuit Court of Appeals' opinion. As a matter of law we say in the circumstances here,

> "the State or State Treasurer, pursuant to the Rules of Practice in District Courts of the United States, No. 20, may proceed against all nonresident respondents in one court and in one proceeding. Furthermore, they are all amenable to service by the simple expedient of serving process upon the secretary of the Public Service Commission.
>
> R. S. Mo. 1929 (as amended), Sec. 5279.
>
> "In view of the foregoing, it will be seen that the State is not relegated or sent anywhere. If it chooses voluntarily to pursue these parties further, it can do so in the local courts, as to citizens of this State (exactly as it must proceed against carriers not party to the litigation—exactly as it would have been required to proceed but for the litigation). As to nonresidents, it can proceed against them in one action in a federal court within this very State and forum" (Respondents' Brief, p. 33).

The mere assertion by petitioners that they might have to file numerous suits in numerous forums does not justify the conclusion that the Three-Judge Court abused its discretion in the circumstances.

In this connection the Court says that "part of the damages for which recovery is sought is made up of various items of cost and expense incurred in the litigation." This statement confirms respondents' feeling that the Court has a misconception about what is involved in the motion for damages. It included no item of expense whatsoever. That subject matter was exhausted by the motion for costs, which sought expenses such as witness fees, attorneys' fees, travel expenses, expenses of transcript of evidence, expenses of printing brief, etc., all as disclosed in the record, pages 73, 74 and 75. Surely, in view of the subject matter of the motion for costs it cannot be correct that the motion for damages includes a request for that type of relief or was ever intended to.

Conclusion: The Court in the opinion concludes with these two sentences: "The circumstances of this case call so strongly for an assessment by equity that we think the Court erred in dismissing the motion for assessment of damages. And it is especially fitting that equity exert its full strength in order to protect from loss a state which has been injured by reason of a suspension of enforcement of state laws imposed by equity itself." The first sentence may mean that circumstances call strongly for consideration by a court of equity of the subject of assessment of damages, if any. If it means more than that it appears to limit the District Judge when the matter reaches him in consideration of the damages to a mere consideration of how much they should be. If that is the intent of the sentence, it deprives respondents of their right to make various defenses, and therefore improperly decides the issue without evidence, but merely on argument.

The second sentence implies a loss to the state which really and in fact did not exist. The State was not attempting to collect such border city license fees from other carriers similarly circumstanced. It had not done so for years. It was the understanding of respondents that the State was not attempting to do so in this case, and that the stipulation (R. 20) had to do only with the type of license fees that were actually paid by respondents. Respondents' supplementary statement (R. 75) sets forth respondents' understanding, that the parties were not to interpret the stipulation as including or dealing with border city operations. It would appear that the Court should afford the respondents opportunity to present argument and evidence on the validity of their understanding. The matter was considered in voluminous correspondence between the parties. It was the subject of several conferences, yet this Court apparently has assumed without the benefit of any evidence on the subject matter that respondents' understandings are incorrect. If the matter can be considered by the District Court and if the District Court finds that the parties did not intend that respondents be obligated for border city fees, regardless of all else, there is no liability for these license fees, and no liability under the motion for damages. This Court, it is respectfully submitted, should not circumscribe the investigation by the District Judge into that subject matter. If, upon a hearing, the District Judge feels that there was to be no commitment or liability to pay border city operation fees, then this is not a case which calls "so strongly for an assessment by equity," and it is not a case where it is "especially fitting that equity exert its full strength" to protect the State from loss, because the State suffered no loss.

The State of Missouri was not seeking to collect border city fees from respondents or from anybody else. Re-

spondents should not be foreclosed from presenting their views on this subject and the facts concerning it to the District Court.

The underlying assumption, as we read the opinion of the Court, is that respondents have been improperly withholding money owed to somebody, and that petitioners can invoke the aid of the Court to take that money from respondents and give it to the proper party. Respondents should be given an opportunity to show they owe no money to anybody in this connection. If they are thus able to show that fact, the underlying assumption of this Court will be seen to be without foundation.

The judgment of the Circuit Court of Appeals should upon further consideration be affirmed. In the alternative the opinion should be modified as to subdivisions second, third and fourth.

Respectfully submitted,

KENNETH TEASDALE,
B. W. LaTOURETTE,
PAUL G. KOONTZ,
Counsel for Respondents.

Certificate of Counsel.

We, the undersigned counsel for the above-named respondents, do each hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

KENNETH TEASDALE,
B. W. LaTOURETTE,
PAUL G. KOONTZ,
Counsel for Respondents.

BLANK PAGE

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 549.—October Term, 1940.

Public Service Commission of the State of Missouri, et al., Petitioners, *vs.* Brashear Freight Lines, Inc., et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 31, 1941.]

Mr. Justice Black delivered the opinion of the Court.

The issues in this case revolve around the power of a federal District Court to assess damages allegedly caused by a temporary injunction issued by the court but later dissolved on final hearing. These issues grow out of this situation: Respondents in this Court, seventy-six individuals, partnerships, and corporations operating trucks as common carriers in interstate commerce, filed a bill in the federal District Court to enjoin petitioners here, Missouri officials and agencies, from enforcing against them certain allegedly unconstitutional tax and license features of the Missouri Bus and Truck Law.[1] A single district judge granted a temporary restraining order under which respondents were required to post injunction bonds and under which the contested fees were to be deposited with a trustee during the litigation. But because the bill sought to restrain state officials from enforcing an allegedly unconstitutional state statute, the case was set down for hearing before a three judge District Court pursuant to section 266 of the Judicial Code as amended, 28 U. S. C. § 380. Petitioners, in their answer to respondents' complaint, counterclaimed for fees and licenses the respondents had failed to pay in the past[2] and later amended the

[1] Mo. Rev. Stats. (1929) § 5272, as amended by Mo. Laws (1931) p. 311. The Missouri officials were the Attorney General, the Superintendent of the State Highway Patrol, the State Highway Commission, and the Public Service Commission. The ground of attack on the statute was that it violated the federal Constitution and the federal Motor Carrier Act of 1935, 49 Stat. 543, 49 U. S. C. §§ 301-327 (Supp. 1939).

[2] Respondents denied "each and every allegation, statement and thing" contained in the counterclaim. Later they contended that it was the understanding of the parties that should the counterclaim become material, then this pleading could be withdrawn and "an opportunity to plead fully" to the counterclaim be exercised. Petitioners denied that there was any such understanding.

counterclaim to include amounts the respondents failed to deposit with the trustee during the litigation. Ultimately, the three judge court found the Bus and Truck Law constitutional, dissolved the restraining order, dismissed the truck operators' bill, and also ordered the counterclaim dismissed without prejudice because of "serious doubt as to the right of the defendants to maintain" such an action. The truck operators did not appeal from the dismissal of their bill. Petitioners' attempt to bring the dismissal of their counterclaim here by direct appeal was dismissed for want of jurisdiction. 306 U. S. 204. Thereupon the petitioners, on their own behalf and "in behalf of the State of Missouri and of the State Treasurer", filed in the three judge court a motion for assessment of damages and costs against the truck operators and their injunction bond sureties. That court denied the requested relief on the ground that the questions presented by the motion for damages had been ruled upon and finally determined by the judgment dismissing the original counterclaim. The Circuit Court of Appeals affirmed,[3] but on a different ground. It held that the motion to assess damages involved issues ancillary to the original litigation, which would require a long and complicated inquiry; that such litigation is not the type for which a three judge court is provided; that the three judge court, however, did have jurisdiction to consider the motion if it saw fit, or to remit it to the single district judge; and that the action actually taken by the three judge court was final, since under the circumstances that court had not abused its discretion. We granted certiorari, 311 U. S. —, primarily because of the procedural importance of determining the statutory function of a three judge court in dealing with questions such as those here presented. The case as presented to us requires that we give consideration to these questions:

1. Should the two additional judges, called to assist the district judge pursuant to section 266, have participated in consideration of the motion to assess damages?

2. Was the District Court correct in holding that its prior denial of the counterclaim was a final adjudication of the issues presented by petitioners' motion to assess damages?

[3] 114 F. (2d) 1.

3. Were the enjoined Missouri officials and agencies, to whom the injunction bonds ran, proper parties to invoke the court's action for assessment of damages?

4. Did the District Court erroneously exercise its discretionary power, by its refusal to hear and determine the merits of petitioners' motion to assess damages?

First. We are of opinion that the two judges called in under section 266 to assist the district judge in passing upon the application for injunction should not have participated in consideration of the motion to assess damages. The limited statutory duties of the specially constituted three judge District Court had been fully performed before the motion for assessment of damages was filed. For section 266 of the Judicial Code provides for a hearing by three judges, instead of one district judge, only in connection with adjudication of a very narrow type of controversy—applications for temporary and permanent injunctions restraining state officials from enforcing state laws or orders made pursuant thereto upon the ground that the state statutes are repugnant to the federal Constitution.[4] The motion for damages raised questions not within the statutory purpose for which the two additional judges had been called. Those questions were therefore for the consideration of the District Court in the exercise of its ordinary jurisdiction, and the three judge requirement of section 266 had no application.[5]

But the fact that it was mistakenly assumed that the motion should be passed upon by the district judge in association with the two judges previously called did not of itself invalidate the District Court's judgment dismissing the motion. Though that judgment of dismissal was not appealable directly to this court under section 266, even though participated in by three judges,[6] it was

[4] See Phillips *v.* United States, No. 201 this Term; Oklahoma Gas & Electric Co. *v.* Oklahoma Packing Co., 292 U. S. 386; Ex parte Public National Bank, 278 U. S. 101, 104.

[5] A District Court composed of three judges under section 266 of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties. Railroad Commission of California *v.* Pacific Gas & Electric Co., 302 U. S. 388, 391; Sterling *v.* Constantin, 287 U. S. 378, 393-394.

[6] See, e. g., Public Service Commission *v.* Columbia Terminals Co., 309 U. S. 620; Public Service Commission *v.* Brashear Freight Lines, 306 U. S. 204, 207. Cf. Eichholz *v.* Public Service Commission, 306 U. S. 268.

reviewable by the Circuit Court of Appeals, and since it has been so reviewed, the issues presented are properly before us.

Second. The ground assigned by the District Court for denying the motion to assess damages was that by its previous dismissal of petitioners' counterclaim it had already ruled upon and finally determined the questions raised by the motion. The original counterclaim, however, was dismissed without a hearing on the merits. No evidence was heard. It was dismissed, as the court said at the time, because of "serious doubt as to the right of the defendants to maintain such counterclaim", and in the order of dismissal it was specified that the action taken was "without prejudice to the right of the defendants . . . . to maintain an independent action or suit thereon." We need not here point out the procedural reasons which might have caused the "serious doubt" which prompted the court to dismiss the counterclaim. For even assuming that the court properly dismissed the counterclaim without a hearing on the merits, it does not follow that its dismissal was a final adjudication of either the procedural or the substantive right of petitioners to invoke the court's jurisdiction by a motion to assess damages. Some of the damages asserted in the motion—such as the costs of the litigation—were not asserted in the counterclaim, and such damages could not well have been determined until after final adjudication of the issues which caused the three judge court to be invoked. The record shows that action on the counterclaim was deferred pending full hearing on the constitutionality of the Missouri statute under attack. This postponement might well be attributed to a belief on the part of the court that the questions raised by the counterclaim were matters which could be better determined after final determination of the issues presented by the original bill for injunction. The judgment dismissing the motion for assessment of damages cannot be supported upon the ground that the issues raised by it had been adjudicated in the prior dismissal of the counterclaim.

Third. Respondents also seek to support the court's judgment upon the ground that the enjoined state officials and agencies are not the proper parties to invoke the court's action for assessment of damages brought about by the injunction. This claim cannot be sustained. The argument on which it rests is that the State Treasurer, not the Public Service Commission, is given statutory power

to collect the fees that are in part the basis of the motion to assess damages. But petitioners insist that the Public Service Commission actually collects the fees under customs and rules of long standing, and urges that statutory authority exists for such action by the Commission. But whoever has the statutory authority to collect fees, it is not denied that the Missouri Attorney General, one of the enjoined and petitioning officials, is given exclusive authority to bring suit in the name of and on behalf of the state.[7] And if upon a hearing damages are shown to have been suffered within the terms and conditions of the injunction bonds, the district court sitting in equity has ample power to see that whatever sums are recovered go to the proper state officials. In addition to this, respondents are in a poor position to argue that petitioners are not proper parties, for one of the grounds upon which the respondents claimed an injunction against these particular petitioners was that it was they who were threatening to bring actions against respondents to collect the very fees which are now a part of the present motion for assessment of damages. At the instance of the operators, these state officials were for a period of fifteen months deprived of all opportunity to collect any fees except those deposited with the trustees pursuant to the terms of the restraining order. Petitioners' motion alleges that many operators failed to comply with the conditions imposed by the order, and that the state has been deprived of fees that it would have collected but for the injunction. The respondents did not bring their suit nor press their claim upon the assumption that these officials could not and would not protect the interest of the state. On the contrary, they acted upon a directly opposite premise and executed bonds running to the enjoined officials in which they agreed to pay the damages suffered. It is obvious, and was obvious from the beginning, that the main damages would be suffered by the State of Missouri and not by these petitioners as individuals. It was to protect the state through its officials that the bonds were required. In making this requirement the court acted in harmony with the governing principle "that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect." *Inland Steel Co.* v. *United*

[7] Mo. Rev. Stats. (1929) § 11276. (Mo. Rev. Stats. (1939) § 12901.)

States, 306 U. S. 153, 157. Petitioners were proper parties to invoke the court's protection of the state's interest, and we have no doubt but that the court can mould any decree it renders so as to safeguard the rights of all interested parties.

Fourth. There yet remains the basis upon which the court below affirmed the District Court's refusal to assess damages—that the jurisdiction to exercise this power is discretionary, and that refusal to exercise the power was not shown to be erroneous. In considering this question, it is of no importance that dealing with petitioners' motion for assessment of damages would involve long and complicated hearings on issues inappropriate for decision by a three judge court. For as we have pointed out, the issues were appropriate for decision by the single judge of the district. There can be no question of that judge's right to deal with issues such as those here presented. Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted. *Russell* v. *Farley,* 105 U. S. 433, 444 *et seq.; Pease* v. *Rathbun-Jones Engineering Co.,* 243 U. S. 273, 279. This power is, as stated, discretionary; there are of course cases where the Chancellor might properly conclude that parties should be remitted to an action at law. But this is not one of those cases. If petitioners had to bring actions at law, each of the seventy-six respondents might have to be made a defendant in a separate action. There is a controversy between the parties as to whether or not all of these respondents could be sued or served in the State of Missouri; to be compelled to sue some of them elsewhere would work a hardship on the state. In addition to this, part of the damages for which petitioners seek recovery is made up of various items of cost and expense incurred in the litigation; if petitioners succeed on the merits, there might conceivably be serious problems raised by the seventy-six respondents as to the portion of damages fairly attributable to each—a problem peculiarly appropriate to equity, and preeminently adapted to settlement by a single court. Here, respondents joined themselves together in order jointly to restrain petitioners; they executed joint bonds; and they invoked the action of equity which has traditionally exerted its power not merely to assess damages caused by improvident injunctions but also to pre-

vent the harmful consequences of an unnecessary multiciplicity of causes of action. The circumstances of this case call so strongly for an assessment by equity that we think the court erred in dismissing the motion for assessment of damages. And it is especially fitting that equity exert its full strength in order to protect from loss a state which has been injured by reason of a suspension of enforcement of state laws imposed by equity itself.[8] The judgment of the court below is reversed and the cause is remanded for proceedings before a single district judge in conformity with this opinion.

Reversed and remanded.

END

[8] Cf. United States *v.* Morgan, 307 U. S. 183, 197; Inland Steel Co. *v.* United States, 306 U. S. 153, 158; Arkadelphia Milling Co. *v.* St. Louis Southwestern Ry., 249 U. S. 134, 145-146.